CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 502

JOHN N. SHANNAHAN AND CLAUDE J. JACKSON,
AS TRUSTEES OF THE PROPERTY OF CHICAGO,
SOUTH SHORE AND SOUTH BEND RAILROAD,
ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF INDIANA.

FILED OCTOBER 14, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 502

JOHN N. SHANNAHAN AND CLAUDE J. JACKSON, AS TRUSTEES OF THE PROPERTY OF CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

INDEX.

	Original	Print
Record from D. C. U. S., Northern Indiana	1	1
Caption ....(omitted in printing)	1	
Petition	2	1
Answer of United States of America	11	7
Intervention of I. C. C.	16	9
Answer of I. C. C.	17	9
Exhibit "A"—Report of I. C. C., Railway Labor Act Docket No. 8	23	13
Recital as to hearing	31	22
Opinion of Court	33	22
Dissenting opinion, Slick, J.	36	24
Findings of fact and conclusions of law	40	27
Order of dismissal	43	29
Bill of exceptions and order settling same	46	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1937.

—3031

	Original	Print
Record from D. C. U. S., Northern Indiana—Continued.		
Petition for appeal	49	30
Order allowing appeal	51	32
Assignments of error	54	33
Bond on appeal (omitted in printing)	57	
Præcipe for transcript of record	60	34
Notice of præcipe, lodgment of statement of evidence, etc.	62	36
Citation and service (omitted in printing)	66	
Condensed statement of evidence	69	38
Testimony of Charles H. Jones	69	38
Petitioners' Exhibit 1—Transcript of proceedings before I. C. C.	70	38
Testimony of Charles H. Jones	71	39
Hugh Sutton	86	53
H. J. Lochmaier	86	53
Jacob M. Ritchie	87	54
W. W. McKirchy	87	54
E. K. Hogan	88	55
R. H. Hauser	89	55
Recital as to South Shore Exhibit 1	89	55
Report and order	89	56
Petitioners' Exhibit 2—Letter from H. A. Johnson	91	57
Petitioners' Exhibit 3—Reply to Exhibit 2	92	58
Petitioners' Exhibit 4—Reply to Exhibit 3	92	59
Petitioners' Exhibit 5—Order for Trustees to enter appearance	93	59
Petitioners' Exhibit 6—Order for Trustees to commence suit	93	59
Petitioners' Exhibit 7—Petition to reorganize	93	59
Petitioners' Exhibit 8—Order approving petition for reorganization	93	59
Petitioner's Exhibit 9—Order appointing trustees	93	60
Petitioners' Exhibit 10—Report of Interstate Commerce Commission approving appointment of trustees	93	60
Petitioners' Exhibit 11—Bond of trustees	93	60
Petitioners' Exhibit 12—Report and order of Interstate Commerce Commission approving plan of reorganization	93	60
Petitioners' Exhibit 13—Certificate of Interstate Commerce Commission showing acceptance of plan of reorganization	94	60
Petitioners' Exhibit 14—Order setting hearing on confirmation of plan of reorganization	94	61
Order approving statement of evidence	94	61
Clerk's certificate (omitted in printing)	95	
Statement of points to be relied upon and designation as to printing record	96	61

[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

In Equity. No. 622

JOHN N. SHANNAHAN and CLAUDE J. JACKSON, as Trustees of the Property of Chicago South Shore and South Bend Railroad, and Chicago South Shore and South Bend Railroad, Petitioners,

vs.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed June 22, 1936

To the Honorable the Judges of the District Court of the United States for the Northern District of Indiana, South Bend Division:

John N. Shannahan, a citizen of the state of Indiana, residing in Marion county, in said state, and Claude J. Jackson, a citizen of the state of Indiana, residing in St. Joseph county, in said state, as Trustees of the property of Chicago South Shore and South Bend Railroad, and Chicago South Shore and South Bend Railroad, a corporation duly organized and existing under the laws of the state of Indiana, and having its principal place of business and office in the city of Michigan City, in LaPorte county, in said state of Indiana, and a citizen of said LaPorte county, Indiana, petitioners, bring this suit and file their petition against the United States of America, defendant, and allege:

1. The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large 208, 219 (28 U. S. C. A. Sec. 41, Sub. 28), in that this is a suit brought to enjoin, set aside, annul and suspend the hereinafter described order of the Interstate Commerce Commission finding and determining that petitioners' line of railroad, commonly known and referred to as the Chicago South Shore and South Bend Railroad,

[fol. 3] is not a street, interurban or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and is, therefore, subject to the provisions of that Act.

2. On May 27, 1936, this court, by its order duly entered in the reorganization proceedings No. 972 hereinafter mentioned, authorized the trustees, petitioners herein, to commence and prosecute this proceeding.

3. Chicago South Shore and South Bend Railroad (herein sometimes called "South Shore") was incorporated June 23, 1925, with charter power to construct, acquire, purchase, own, maintain and operate street railroad, interurban street railroad and suburban street railroad lines and systems. The South Shore purchased and acquired title by deed of conveyance on July 13, 1925, to an electric interurban railroad operated between Chicago, Illinois, and South Bend, Indiana, approximately 90 miles in length. It operated said electric interurban railroad from July 13, 1925, until November 1, 1935.

4. The South Shore filed its petition No. 972 in the United States District Court for the Northern District of Indiana, South Bend Division, on September 30, 1933, to effect a plan of reorganization under Section 77 of the Acts of Congress relating to Bankruptcy and the Court in said proceedings entered on said date an order approving the petition as properly filed and authorizing and directing the Debtor, the South Shore, to run and operate the railroad, which it did under the directions of the Court until November 1, 1935. On September 30, 1935, the Court appointed the petitioners, John N. Shannahan and Claude J. Jackson, trustees of the property of the Chicago South Shore and South Bend Railroad, and the Interstate Commerce Commission, by its order entered October 30, 1935, Finance Docket No. 10165, ratified said appointment. On November 1, 1935, said Trustees, John N. Shannahan and Claude J. Jackson, qualified and filed their bond, which was duly approved by said Court. Since November 1, 1935, said Trustees have operated the said South Shore as such Trustees [fol. 4] and are now operating the same as such, and by virtue of the said proceedings are the legal owners, as such Trustees, of the property of said South Shore.

5. The Interstate Commerce Commission in the said proceedings for the reorganization of said railroad, by an order entered by said Commission in said proceedings, Finance Docket No. 10165 of said Commission, on April 16, 1936, approved a plan of reorganization of said railroad, which provides for the retention of all of the Debtor's property by the Debtor.

6. On August 9, 1934, the National Mediation Board, pursuant to the proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934 (45 U. S. C. A., Sec. 151), requested the Interstate Commerce Commission to determine whether the Chicago South Shore and South Bend Railroad, a railroad operated by electric power, falls within the terms of the proviso in the first paragraph of said section, which proviso exempts from the provisions of the Act, any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam railroad system of transportation. That the fact is, that the line of said South Shore never has been operating and is not now operating as a part of a general steam railroad system of transportation.

7. On May 17, 1935, the Interstate Commerce Commission, pursuant to said request of the National Mediation Board, gave notice to the South Shore that the matter of determining the status of the South Shore under the proviso of the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, had been assigned for hearing at Hotel Morrison, Chicago, Illinois, June 25, 1935, at nine o'clock a. m., Standard Time. At said time and place the South Shore appeared and offered and introduced evidence, both oral and documentary, in support of its claim that it was an interurban railway and exempt from the operation of the Railway Labor Act, as amended June 21, 1934, by virtue of the said proviso exempting street, interurban and suburban electric railways from the oper- [fol. 5] ation of said Act. The South Shore filed its brief with the Interstate Commerce Commission in said matter on August 9, 1935, and argued the matter orally before said Commission on November 19, 1935. The petitioners, John N. Shannahan and Claude J. Jackson, as Trustees of the property of the Chicago South Shore and South Bend Railroad, Debtor, on December 30, 1935, filed their written entry

of appearance in the proceedings pending before the Commission to determine the status of said railroad under said proviso of the first paragraph of Section 1 of the Railway Labor Act.

8. The proceedings before said Interstate Commerce Commission resulted in the said Commission, on February 14, 1936, filing its report, in which it ordered, found and determined that the Chicago South Shore and South Bend Railroad is not a street, interurban or suburban electric railway within the meaning of the exemption proviso of the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and that the South Shore is, therefore, subject to the provisions of said Act. That the order of said Commission does not relate to transportation, or to a matter complained of before said Commission.

9. The petitioners on April 13, 1936, filed their petition for a rehearing and the Commission on May 11, 1936, upon consideration of the petition for rehearing, entered an order in which it denied said petition.

10. The Interstate Commerce Commission, in making and issuing said order, finding and determination, erred as a matter of law in the following particulars, to wit:

(a) Said order, finding and determination is contrary to the indisputable character of the evidence, and

(b) The facts found by said Commission do not, as a matter of law, support the order, finding and determination of the Commission, and

(c) Said order, finding and determination is unsupported by the evidence, is without supporting evidence and is arbitrary, and

[fol. 6] (d) The line of the Chicago South Shore and South Bend Railroad is an interurban electric railway within the exemption proviso of the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and is not operated as a part of a general steam railroad system of transportation.

11. Notwithstanding the matters and things hereinbefore alleged, the petitioners are threatened with the enforcement of the order, finding and determination complained of above,

and said order, finding and determination will be enforced against petitioners unless it is set aside, annulled and suspended and the enforcement thereof enjoined by this Court.

12. That pursuant to said order, finding and determination complained of above, said National Mediation Board is threatening to take, and has taken, jurisdiction of proceedings for the purpose of enforcing the provisions of said Railway Labor Act, as amended June 21, 1934.

13. That the order, finding and determination complained of above is void for lack of jurisdiction of the Interstate Commerce Commission.

Wherefore, petitioners pray:

(1) That the said order, finding and determination of the Interstate Commerce Commission that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and that it is, therefore, subject to the provisions of said Act, be set aside, annulled and suspended and that the enforcement of said order, finding and determination be enjoined;

(2) That it be ordered, decreed, found and determined that the Chicago South Shore and South Bend Railroad is an interurban electric railway and that the same is not operated as a part of a general steam railroad system of transportation and as such is not subject to the provisions of the Railway Labor Act, as amended June 21, 1934;

[fol. 7] (3) That it be ordered, decreed, found and determined that petitioners, John N. Shannahan and Claude J. Jackson, as trustees of the property of Chicago South Shore and South Bend Railroad, Debtor, are operating an interurban electric railway and that the same is not operated as a part of a general steam railroad system of transportation and as such is not subject to the provisions of the Railway Labor Act, as amended June 21, 1934;

(4) That the Interstate Commerce Commission in making and entering the aforesaid order, finding and determination that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban or suburban electric railway within the exemption proviso of the first para-

graph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and is, therefore, subject to the provisions of said Act, be found and decreed to have acted arbitrarily and contrary to and in excess of the powers of said Commission and without authority of law, contrary to the indisputable character of the evidence and without supporting evidence, and that the facts found do not as a matter of law support said order, finding and determination of the Commission;

(5) That the petitioners have such other, further and general relief as the nature of the case may require and the Court may deem just, equitable and proper.

May it Please Your Honors to grant unto the petitioners appropriate process against the Defendant, United States of America, requiring it to answer the petition as required by law, but not under oath, answer under oath being hereby expressly waived; that a temporary restraining order and interlocutory preliminary injunction granting the relief herein prayed, be issued upon motion of petitioners and that [fol. 8] upon final hearing the relief herein prayed for be granted, ordered and decreed; and the petitioners will ever pray.

(Signed) John N. Shannahan, Claude J. Jackson, As Trustees of the Property of Chicago South Shore and South Bend Railroad. Chicago South Shore and South Bend Railroad, (Signed) by John N. Shannahan, President.

Attest: ——— ———, Secretary.

(Signed) Aaron H. Huguenard, John C. Lawyer, Attorneys for Petitioners.

[fols. 9-10] *Duly sworn to by John N. Shannahan and Claude J. Jackson. Jurat omitted in printing.*

[fol. 11] [File endorsement omitted.]

In United States District Court

[Title omitted]

Answer of United States of America—Filed July 6, 1936

First Defense

United States for its first defense to the bill of complaint filed herein against it says:

1. This Court is without jurisdiction to entertain the bill of complaint because the alleged order of the Interstate Commerce Commission complained of is not an order within the meaning of the Urgent Deficiencies Act of October 22, 1913, ch. 32, 38 Stat. 308, 219 (28 U. S. C. A. Sec. 41, subdivision E).

2. The bill of complaint contains no allegation that any officer or agency of the Federal Government has threatened to or has the authority to enforce the alleged order of the Interstate Commerce Commission complained of.

3. The Interstate Commerce Commission is without power or authority to enforce its determination.

4. The National Mediation Board is without power or authority to enforce the alleged order of the Interstate [fol. 12] Commerce Commission and has no power or duty to enforce any order it may make.

5. The facts alleged in the bill of complaint do not state a cause of action against United States and are not sufficient to entitle the complainant to the relief prayed.

Wherefore, United States moved that petitioner be denied injunctive relief, that the bill of complaint be dismissed, and prays that an order be entered accordingly.

Second Defense

United States for its second defense to the bill of complaint filed herein against it says:

1. Answering paragraph 1, United States denies that petitioner's suit is one to enjoin, set aside, annul, or suspend

in whole or in part an order of the Interstate Commerce Commission, and avers that the determination of the Interstate Commerce Commission complained of is not an order within the meaning of the Urgent Deficiencies Act above referred to.

2. Answering paragraphs 2, 3, 4 and 5, United States, for lack of information, denies the allegations contained therein.

3. Answering paragraph 6, United States admits that on August 9, 1934, the National Mediation Board, pursuant to paragraph first of Section 1 of the Railway Labor Act, as amended June 21, 1934 (45 U. S. C. A. Section 151) requested the Interstate Commerce Commission to determine whether the lines of the Chicago South Shore and South Bend Railroad came within the terms of the proviso of the first paragraph of said section. United States denies all other allegations contained in paragraph 6.

4. Answering paragraph 7, United States admits the allegations therein contained.

[fol. 13] 5. Answering paragraph 8, United States admits the allegations thereof except that it denies that the Commission by its determination made any order upon the Chicago South Shore and South Bend Railroad Company.

6. Answering paragraph 9, United States admits the allegations thereof.

7. Answering paragraph 10, United States avers that the statements therein contained are conclusions of law and argumentative, and require no answer. United States, however, denies the conclusions therein contained.

8. Answering paragraph 11, United States denies the allegations therein contained and avers that said determination of the Interstate Commerce Commission is not an order, and that said determination is not enforceable by the Interstate Commerce Commission.

9. Answering paragraph 12, United States, for lack of information, denies the allegations therein contained, and avers that the National Mediation Board, under the Railway Labor Act, is without power or authority to enforce any order it may make.

10. Answering paragraph 13, United States avers that the statements therein contained are conclusions of law and require no answer.

Wherefore, having fully answered the bill of complaint, United States prays that the relief therein prayed be denied, and that said bill be dismissed with costs to the com- [fols. 14-15] plainant, and that it have such other and further orders, decrees, or relief as may be just and equitable in the premises.

Leo F. Tierney, Special Assistant to the Attorney General. John Dickinson, Assistant Attorney General. James R. Fleming, United States Attorney. Alexander M. Campbell, Assistant United States Attorney.

Duly sworn to by Leo F. Tierney. Jurat omitted in printing.

[fol. 16] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed August 17, 1936

To the Honorable the Judges of Said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, sup. VI, title 28, sec. 45a), we hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

Daniel W. Knowlton, Chief Counsel. Nelson Thomas, Attorney.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed August 17, 1936

The Interstate Commerce Commission, hereinafter called the Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the petition herein, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraph 1 of the petition, the Commission denies that this is a suit brought to enjoin, set aside, annul [fol. 18] or suspend an order of the Interstate Commerce Commission or any part thereof, and alleges and states that the action of the Commission and its report, hereinafter described, and in said paragraph referred to, is not an order within the meaning of the term as used in the Urgent Deficiencies Act of October [illegible], 1913, under which petitioners allege that they bring this suit.

II

Answering paragraphs 2 to 4, inclusive, of the petition, the Commission neither admits nor denies the truth of the allegations therein contained and prays the Court to require petitioners to make strict proof thereof.

III

Answering paragraphs 5 to 9, inclusive, of the petition, the Commission, for the purposes of this suit, admits the truth of the allegations therein contained, except that the Commission denies that paragraph 6 correctly states the effect of the proviso contained in the first paragraph of Section 1 of the Railway Labor Act, as amended, and respectfully refers the Court to the provisions of said act for information relative thereto, except that the Commission denies the allegation in said paragraph 6 of the petition to the effect that the petitioners' line is not and never has been operated as a part of a general steam railroad system of transportation, and except that the Commission denies that, as alleged in paragraph 8 of the petition, it, on or about February 14, 1936, or upon any other date, made any order against the petitioners.

[fol. 19]

IV

Further answering said petition, the Commission admits and alleges that on or about May 17, 1935, pursuant to request made of it by the National Mediation Board, it instituted a proceeding entitled Railway Labor Act Docket No. 8, Chicago South Shore and South Bend Railroad, wherein it undertook to determine after a hearing whether the Chicago South Shore and South Bend Railroad falls within the terms of a certain proviso contained in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934. In the course of the hearing in said proceeding, the Commission heard all parties interested in said proceeding and on or about February 14, 1936, issued its report, a true copy of which is hereto attached, marked Exhibit A, and made a part hereof. (Reported 214 I. C. C. 167.)

The Commission alleges that in the course of said proceeding and prior to the making and entering of the aforesaid report of February 14, 1936, the parties thereto, including the petitioners in this suit, were, and that each of them was, accorded the full hearing required by law; that in the course of the hearing aforesaid a large volume of testimoney and other evidence bearing upon the subject matter of the inquiry was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of the petitioners herein; that at said hearing and subsequently, questions relating to said matters were fully submitted to and were received by the Commission, whereupon the Commission determined said matters and made and entered its report of February 14, 1936; that said report includes the Commission's final findings of fact, its decision [fol. 20] and conclusions in the premises, and that upon the evidence aforesaid the Commission made its findings and stated its conclusions as set out in its report aforesaid.

The Commission further admits and alleges that the findings and conclusions stated in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in the proceedings aforesaid; that in making said report it considered and weighed carefully in the light of its own knowledge and experience each fact, circumstance and condition called to its attention on behalf of the parties in said proceeding; that neither said report nor any part thereof was made or issued either arbitrarily or unjustly, or contrary to law or to the relevant evidence, or without evidence to support it; that in making said report the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all of the allegations to the contrary contained in the petition.

V

Further answering said petition, and particularly paragraphs 10 to 13, inclusive, thereof, the Commission denies that its report of February 14, 1936, or any finding or determination therein contained, is unlawful or void for any reason whatsoever, and denies that its action in the premises has resulted or will result in depriving the petitioners of any legal right or in any way violates the provisions of the Constitution or of the laws of the United States, and the Commission further denies that the petition contains allegations which, if true, would warrant any relief either in law or equity.

[fol. 21]

VI

Further answering said petition, the Commission alleges that this Court, specially constituted as required by the Urgent Deficiencies Act of October 22, 1913 (39 Stat. 218, U. S. C. sup. VII, tit. 28, secs. 41(28) to 48, both inclusive), is without jurisdiction to entertain the prayer of the petition herein inasmuch as it relates only to findings and conclusions of the Commission, upon which the Commission has made no order or requirement against the petitioners; that the jurisdiction of the specially-constituted three-judge court is derived from said Urgent Deficiencies Act of October 22, 1913, and from the Commerce Court Act of June 18, 1910, 36 Stat. 539, and that said acts, properly construed, do not vest the specially-constituted district courts with jurisdiction to correct or declare erroneous or to enjoin, set aside, annul or suspend a finding, conclusion or report of the Commission not followed by or made a part of an order.

Except as expressly admitted in this answer, the Commission denies the truth of each of and all the allegations contained in the petition in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report of February 14, 1936.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by Nelson Thomas, Attorney. Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 22] *Duly sworn to by Frank McManamy. Jurat omitted in printing.*

[fol. 23] EXHIBIT "A" TO ANSWER

20990.

INTERSTATE COMMERCE COMMISSION

Railway Labor Act Docket No. 8

CHICAGO SOUTH SHORE & SOUTH BEND RAILROAD

Submitted November 19, 1935. Decided February 14, 1936

Chicago South Shore & South Bend Railroad found not to be a street, interurban, or suburban electric railway within the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act.

John C. Lawyer and Ray Garrett for carrier and trustees of its property under the bankruptcy law.

Ezra Brainerd, Jr., E. L. Oliver, J. F. Emerson, J. P. Farrell, Alex E. Gordon, Martin H. Miller, W. W. McKirchy, and Edmond K. Hogan for labor organizations.

Report of the Commission

Division 3, Commissioners McManamy, Mahaffie, and Miller

MCMANAMY, Commissioner:

This proceeding was instituted at the request of the National Mediation Board to determine whether the Chicago South Shore and South Bend Railroad is exempt from the Railway Labor Act as amended June 21, 1934, under the proviso to the first paragraph of section 1 thereof, which reads as follows:

> Provided, however, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation

Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

A hearing has been held at which evidence was introduced on behalf of the above-named railroad, which contends that it is exempt as an interurban, and on behalf of the Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Engineers, Order of Railway Conductors, Brotherhood of Railway Firemen, and other labor organizations. Briefs were filed on behalf of the parties referred to together with the Railway Labor Executives' Association, which joined the other labor organizations in opposing the carrier's contention. The parties waived the issuance of a proposed report by the examiner, and the case was submitted upon oral argument before us. Subsequent to the [fol. 24] oral argument, an appearance was entered by the trustees of the carrier's property appointed under section 77 of the Bankruptcy Law, such trustees being represented by the same counsel as the carrier, and no further hearing or argument was requested by them. For convenience, the carrier will sometimes be referred to as the South Shore.

The Railway Labor Act as amended June 21, 1934, provides for the prompt and orderly settlement of disputes between the carriers and their employees. The first paragraph of section 1 thereof defines the term "carrier" as including among others any carrier by railroad subject to the Interstate Commerce Act, which is followed by the proviso hereinbefore quoted. There is no question that the South Shore is a carrier by railroad subject to the Interstate Commerce Act, except such sections thereof as contain exemptions somewhat similar to that here under consideration. The South Shore is operated with electric power, and none of its capital stock is owned by any steam railroad. The only issue, therefore, is whether its operations are those of an interurban as that term is used in the proviso.

In the first case arising under this proviso in the Railway Labor Act, Texas Electric Ry., 208 I. C. C. 193, division 6 said at pages 194, 195:

> The amended Railway Labor Act does not indicate the purpose of exempting the class of lines referred to in the proviso to the first section. No reason is apparent for

distinguishing between steam and electric power, and the act does not purport to exempt all electric lines. There are other reasons which may have influenced Congress, but we think the fundamental reason was that the lines exempted are essentially local in character and largely disassociated from the steam-railroad systems. This belief is confirmed by reference to the Congressional hearings preceding the passage of this act and other acts containing similar exemptions, which hearings are referred to in the briefs and oral argument of both sides.

Previous to the passage of the amendment to the Railway Labor Act on June 21, 1934, this Commission had rendered numerous decisions regarding the status of particular electric lines under somewhat similar exemption provisions in certain sections of the Interstate Commerce Act and other acts which we administer. These decisions recognized the existence of a class of electric railways which are more than street, interurban, or suburban lines, and which are sometimes referred to as commercial railways operated by electric power. Perhaps the best description of what constitutes a street, interurban, or suburban railway was given in Rules for Testing Other Than Steam Power Locomotives, 122 I. C. C. 414, where the Commission said at page 424:

> "It is well known that electric cars were at first confined to street service in cities and towns. Gradually the lines were extended to the suburbs. Next came the idea of extending the lines from city to city. These three steps gave rise to the terms street, suburban, and interurban electric railways. These lines were limited almost exclusively to carriage of passengers. They were built largely upon streets and public highways. The only material difference [fol. 25] between street, suburban and interurban lines was the extent of the lines. If the line extended from city to city it was termed an interurban although handling the same traffic and being operated in substantially the same manner as the street or suburban line. We think this is the usual conception of the interurban line today.
>
> "Obviously the character of the lines may change without a change in the name of the operating company. The record here shows that the name of a carrier, whether it is called a railroad, traction system, interurban railway, or power and light company, indicates nothing as to the character of the line or the nature of the traffic handled. We must look

to the substance of the matter. A line which today extends only between two cities, and is dependent upon passenger traffic for the bulk of its revenues, might properly be termed an interurban line. In a period of years it might through natural development or consolidation become a railway comparable with our steam railroads and still retain its original name. It would no longer, however, be an interurban railway in substance and in fact. There would be a point, although not definitely defined, where the line passed beyond the true interurban."

The South Shore operates an electric railroad between Chicago, Ill., and South Bend, Ind., 89.8 miles. It generally parallels and competes with lines of the New York Central system. Approximately 6.39 miles of its line between the Indiana-Illinois State line and Kensington, Ill., is leased from the Kensington & Eastern Railroad Company, a subsidiary of the Illinois Central Railroad Company, and the South Shore has trackage rights over the Illinois Central's electrified suburban line between Kensington and Randolph Street in Chicago, 14.2 miles. Employees of the South Shore who operate over the Illinois Central's tracks are required to take the same examination that the latter carrier gives to its own employees. That portion of the line in Indiana amounting to about 69 miles was constructed between 1907 and 1909 by the Chicago, Lake Shore and South Bend Railroad Company and was acquired by the South Shore at a foreclosure sale in 1925. Both the South Shore and its predecessor were incorporated in Indiana under an act for the incorporation of street-railroad companies, but the South Shore was reorganized in 1929 under the general corporation act of the same State. Its articles of reorganization, like the original articles, authorize the operation of street, interurban, or suburban lines. The original franchises to use the streets in various cities and towns for a street and interurban railway were surrendered in 1922 for an indeterminate permit under the Public Service Commission Law of Indiana. All of the common stock and class B preferred stock of the South Shore is owned by the Midland Utilities Company, which is also the largest holder of the class A preferred stock. The South Shore's employees averaged 832 in 1928 and 463 in 1934.

The tracks are of standard gage, generally with 100-pound rails, but some weigh from 70 to 130 pounds per yard. [fol. 26] Approximately 20.26 miles of the line is double track, and the balance is single track. The line used into Chicago is elevated, as are the other railroads in the same vicinity. The maximum grade is 2.5 per cent, but the ruling grade is level, and the maximum curvature is 10°. The roadbed is generally ballasted with gravel, and compares favorably with some of the steam railroads in the same vicinity, but is not equal to those of the large trunk lines. A block-signal system is used, together with interlocking-signal devices at crossings with several other railroads. There are no cattle guards along the line. Steam locomotives could operate over this line, and were used on it for construction purposes when the overhead system was rebuilt in 1925 and 1926. Approximately 5.98 miles or 6.6 per cent of the line is on public streets, and the balance is on private right-of-way.

The South Shore operates 32 passenger trains each way daily over all or portions of its line, most of which consist of one or two coaches. The maximum number of coaches per train is ordinarily 5 or 6, although occasionally as many as 10 coaches are handled on excursion trains, and in one instance 20 coaches were handled with a locomotive. The South Shore has 62 passenger cars, of which 49 are motor cars and the balance trailers. Their seating capacity ranges from 44 to 56 passengers compared with from 76 to 98 in steam-railroad cars. This carrier also has two dining cars and four parlor cars, which are not now in use. Ten of the passenger cars have baggage compartments, and baggage and express are carried but not mail. Passenger stations and agents are maintained by the South Shore at eight points, and it uses six Illinois Central passenger stations at various places in Chicago. Stops are also made on signal at highway crossings in the country between regular stations. The local passenger fares of the South Shore are on the basis of 3.6 cents per mile, which generally applies on the steam railroads in this territory. No interline tickets are sold except in connection with the Illinois Central and the Chicago, Indianapolis & Louisville Railway, which represents less than one half of 1 per cent of the South Shore's passenger business.

This line had no freight business prior to 1916. Since then, its freight revenue has gradually increased from $4,807 in that year to a maximum of $1,596,246 in 1930. During each of the last four years preceding the hearing, 1931 to 1934, inclusive, its freight revenue exceeded its passenger revenue. The freight traffic is of a mixed character, except that no livestock is handled, because of a deed restriction covering about 6 miles of the right-of-way which also limits the use thereof to street and interurban railway purposes. Over 90 per cent of the freight handled by the South Shore is interchanged with other railroads and moves [fol. 27] in interstate commerce. The commodity handled in largest volume is coal, which is received from lines on the east and delivered to other lines on the west. The South Shore is also an intermediate carrier with respect to grain moving east. It is a party to a large number of tariffs publishing joint rates to and from points throughout the country. The South Shore maintains a traffic organization at Chicago and other points on its line, and it also has off-line solicitors at Minneapolis, Minn., Kansas City, Mo., Seattle, Wash., and in Wisconsin.

This carrier has 14 electric locomotives, with a rating of 4,000 tons each, which are used for hauling its freight trains. These generally consist of from 40 to 55 cars, although 60 to 70 cars have been handled occasionally, and one instance is referred to of an 87-car train. The South Shore has only 16 revenue-freight cars, and the bulk of its freight is therefore handled in foreign-line equipment. This is repaired when necessary in the South Shore's shops under rules of the American Railway Association, an average of about 100 cars per month being so repaired. Direct connections for the interchange of carload freight are maintained with seven trunk lines and six belt or switching lines which serve the Chicago district. The number of carloads of freight interchanged with these connections in recent years has ranged from 29,674 to 58,790 per year. Considerably higher estimates are given by the labor organizations, which apparently include empty as well as loaded cars. Practically the only freight which is not interchanged is a small amount of less-than-carload traffic. Formerly the South Shore had a large amount of less-than-carload business, but this has largely been lost to the trucks.

The South Shore was not under Federal control during the World War emergency period. It points out that, although its freight revenues have slightly exceeded its passenger revenues for several years, the passenger revenues of the class I steam railroads averaged only 10.6 per cent of their total revenues in 1933 and were only 20.8 per cent in 1920, when passenger revenues apparently reached their peak. On brief it is stated that the South Shore issued its securities without authority from this Commission under section 20a of the Interstate Commerce Act, but that was not shown by the evidence and in any event would not be controlling in this proceeding. See Fort Dodge, D. M. & S. R. Co., 211 I. C. C. 9, at page 12.

An Indiana statute referred to by the carrier authorizes interurbans to carry all classes of freight subject to the rules and regulations of the Public Service Commission. The South Shore also refers to Chicago, L. S. & S. B. Ry. Co. v. Guilfoyle, 198 Ind. 9, 152 N. E. 167, as holding that it is an interurban. However, the principal issue there was whether the South Shore could handle freight along a cer- [fol. 28] tain street in South Bend after surrender of its franchise, which prohibited the hauling of such freight. This issue was decided in favor of the South Shore, and it does not appear that there was any issue presented regarding the South Shore's status as an interurban. Moreover, that decision was rendered in 1926 when the South Shore's passenger revenue was approximately three times its freight revenue.

The South Shore relies upon a decision of the former Railroad Labor Board rendered December 11, 1920, under the labor provisions of the Transportation Act, 1920. Section 300 (1) thereof in defining the term "carrier" excepted "a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation." The South Shore was one of 11 electric railways which the Labor Board found were exempt under that provision. It should be noted that in 1920 the South Shore's freight revenue was only $171,732 compared with passenger revenue of $675,226, which makes an important difference in conditions from the present. Moreover, the Labor Board's decision was rejected by the Supreme Court in Piedmont & N. Ry. Co. v. Interstate Commerce Commission, 286 U. S. 299; and by the Commission in Rules for

Testing Other Than Steam Power Locomotives, 122 I. C. C. 414; Texas Electric Ry., supra; Piedmont & N. Ry. Co., 211 I. C. C. 4; and Fort Dodge, D. M. & S. R. Co., supra.

In Rules for Testing Other Than Steam Power Locomotives, supra, the Commission considered the status of a large number of electric railways under the Locomotive Inspection Act, which excludes "street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation." The South Shore was among those carriers which were there found to be more than street, suburban, or interurban railways and therefore not within the exemption. The appendix to that report shows that the South Shore's freight revenues were then much less than its passenger revenues. Such changes in conditions as have since taken place therefore tend to confirm and strengthen the support for that decision.

In Texas Electric Ry., supra, division 6 said at page 202:

> The Commission's views as to what constitutes an interurban were stated in Rules for Testing Other Than Steam Power Locomotives, supra. Those views should not be lightly departed from after Congress has authorized the Commission to determine the status of electric railways under a similar exemption provision in an act not otherwise administered by us. In harmony with that and similar decisions, we are of the opinion that an electric railway which is engaged in the general transportation of freight, whether the revenue therefrom is greater or less than its passenger revenue, which handles the bulk of such freight in standard equipment similar to that used by the steam railroads, which freely interchanges the same with the steam rail- [fol. 29] roads for transportation to or from points on their lines, a considerable portion thereof being handled in interstate or foreign commerce, and which participates in joint rates with the steam railroads for interstate transportation, has more of the characteristics of a commercial railroad operated by electric power than of an interurban as that term is used in the exemption provision under consideration. Of course, there are many other circumstances and conditions which may have a bearing on the question, and some electric railways are of such an unusual character that their status might depend on other things, but we believe the factors referred to are generally the most impor-

> tant and should be given great weight where all of them exist together.

A petition to reopen that decision was denied by the Commission on May 13, 1935. The South Shore is clearly a commercial railroad operated by electric power, within the above rule.

In Piedmont & N. Ry. Co., supra, decided October 11 1935, we said at page 8:

> Previous to the amendment to the Railway Labor Act on June 21, 1934, this Commission had passed upon the status of numerous electric railways under more or less similar exemption provisions in other acts administered by us. These decisions recognized a class of electric railways which were regarded as more than interurbans and were sometimes referred to as commercial railways operated by electric power. The distinction between them hinged largely upon the amount and character of freight business handled, an interurban being considered primarily a carrier of passengers and its freight traffic largely local. When Congress authorized this Commission to determine the status of electric railways under the Railway Labor Act, which is not otherwise administered by us, it is reasonable to suppose that it did so because of our experience in passing upon such questions under similar exemption provisions in other acts. This may also be regarded as a pretty good indication that Congress used the word "interurban" in the same sense as the Commission had interpreted that term in its decisions.

Briefly summarizing, the South Shore derives the largest portion of its revenue from freight traffic, over 90 per cent of which is interchanged with other railroads and moves in interstate commerce, including a considerable amount of through traffic handled as an intermediate carrier, and all of such traffic is generally handled in standard equipment under joint rates maintained with the steam railroads to and from points throughout the country. The South Shore was found not to be an interurban within a similar exemption provision in Rules for Testing Other Than Steam Power Locomotives, supra, and it has the characteristics of a commercial railroad operated with electric power within the rule laid down in Texas Electric Ry., supra.

We find that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act.

[fols. 30-31] IN UNITED STATES DISTRICT COURT

RECITAL AS TO HEARING—May 18, 1937

Come now the parties herein, and now the evidence is begun and concluded, the arguments of counsel are heard and said cause is taken under advisement.

[fols. 32-33] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

Equity No. 622

JOHN M. SHANNAHAN and CLAUDE J. JACKSON, as Trustees of the Property of Chicago South Shore and South Bend Railroad, and Chicago South Shore and South Bend Railroad, Petitioners,

vs.

UNITED STATES OF AMERICA, Defendants

Before Evans, Circuit Judge, and Baltzell and Slick, District Judges

OPINION—Filed August 16, 1937

Views of the Majority of the Court, Evans and Baltzell

On February 14, 1936, the Interstate Commerce Commission filed its report in writing which contained, among other things, the following paragraph:

"We find that the line of the Chicago, South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act."

The report appears in 214 I. C. C. 167-173.

Preceding this finding is a statement which sets forth the proceedings of the Interstate Commerce Commission and a résume of the evidence received on the hearing.

The petitioners brought suit against the United States to enjoin, by temporary restraining order and interlocutory preliminary injunction, the "Interstate Commerce Commis- [fol. 34] sion from making or entering the aforesaid order, finding, and determination that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended, and that said order be set aside, annulled and suspended."

The Interstate Commerce Commission intervened.

The determinative question is one of jurisdiction.

Is the case one for the determination of a three judge statutory court? The answer to this question turns upon the character of the ruling which was made by the Interstate Commerce Commission.

A three judge statutory court is one of limited jurisdiction. Procter & Gamble v. United States, 225 U. S. 282; United States v. Atlanta, Birmingham & C. R. Co., 282 U. S. 522; United States v. Los Angeles & S. R. R. Co., 273 U. S. 299; Great Northern Ry. Co. v. U. S., 277 U. S. 172; Pittsburgh & West Va. Ry. Co. v. U. S., 281 U. S. 479

Its jurisdiction is limited to "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." Section 207 of the Judicial Code, U. S. C. Title 28 Sec. 41 (27) and (28).

We are therefore first called upon to determine whether the report of the Interstate Commerce Commission was an order of that body.

It may be readily conceded that it is not the name which the Commission gives to its action or to the document which evidences its action that determines whether it is a finding, [fol. 35] a report, or an order. For example, the Interstate Commerce Commission may call an order a report or the report may call an order a finding. Likewise, counsel may call a finding an order or a conclusion, a finding. Courts are not interested in the names used, but in the action taken by the Interstate Commerce Commission.

The Supreme Court cases cited above apply to instances where a report was held not to contain an order. In United States vs. Los Angeles R. R. Co., supra, it is said:

> "The final report on value, like the tentative report, is called an order. But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act."

An examination of the entire report fails to show wherein the Interstate Commerce Commission made any order or direction to the carrier. It made a finding. Later it may make an order upon that finding. Likewise, it may modify its finding or withdraw it. Until an order, however, is made upon the finding, a three judge court is without jurisdiction to act. Such a court may "enjoin, set aside, annul, or suspend" only an order of the Interstate Commerce Commission.

Having no jurisdiction of the cause, it (a three judge court) cannot even determine whether an equitable cause of action is stated which may entitle the plaintiff to relief in the United States District Court for the Northern District of Indiana, South Bend Division. Such question is for the District Judge of that court to determine.

For the reasons stated this three judge statutory court must decline to take jurisdiction of the cause or grant the relief sought.

Slick, dissenting, in a separate memorandum.

Upon the filing of this memorandum the parties are directed to present a proper order and special findings of fact and conclusions of law.

[fol. 36] DISSENTING OPINION

SLICK, Judge (Dissenting):

The matter involved in this controversy appears so important to me that, notwithstanding the great respect I have for the majority opinion filed by my worthy Associate

Judges, I am constrained to briefly express my views in this dissenting opinion.

In United States et al. vs. Los Angeles and Salt Lake Railroad Company, 273 U. S. 299, relied upon by defendants, the Supreme Court seems to fix a rule for determining the question of jurisdiction of a three-judge court, depending upon whether the Interstate Commerce Commission in making its finding was exercising a quasi-judicial function to determine controversies.

In this case the Interstate Commerce Commission functioned in a quasi-judicial manner. The Railway Labor Act puts certain duties and obligations upon carriers, and in defining "carriers", the act provides that there shall not be included any street, interurban or suburban electric railway, unless such railway operates as part of a general steam railway system. The act authorizes and directs the Interstate Commerce Commission upon request of the Mediation Board to "determine after hearing whether any line operated by electric power falls within the terms of this proviso." The Mediation Board made such a request and this was in the nature, under the statute, of a suit. Notice was required and given. A hearing was had. Evidence was taken. Arguments were made and briefs filed. Then followed a final determination or order as follows: "We find that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act as amended June 21, 1934, and it is therefore subject to the provisions of that act."

[fol. 37] In United States et al. vs. Los Angeles and Salt Lake Railroad Company, supra, which involved an appraisal of property only, the court in deciding that the case was not triable by a three judge court, said that the so called order did not "grant or withhold any privilege or license"; that the finding did not "extend or abridge any power or facility"; that the order did not "subject the carrier to any liability, civil or criminal; that the finding did not "change the carrier's existing or future status or condition."

The finding or order in this case does withhold a privilege; that accorded electric interurbans to exemption from the operation of the Railway Labor Act. It does abridge the rights and powers of the Chicago South Shore and South

Bend Railroad. It subjects the company to civil, possibly criminal, liability, and is so treated by the Mediation Board in demanding a compliance with the order. It changes the company's existing and future status from an electric interurban to a carrier, as defined under the Railway Labor Act, and determines the company's status and fastens upon it an obligation. It was in effect and for the purpose of the hearing, an order fixing and determining the status of the company and deciding that the company is "subject to the provisions of the act."

The act of Congress giving this court jurisdiction does not define or limit the nature of an order to render it reviewable. The order here is the final determination and finding that the South Shore is a carrier, and that it is therefore subject to the provisions of the Railway Labor Act.

The proceeding before the Interstate Commerce Commission was an adversary one, contested, tried, and decided like any other suit. It was a quasi-judicial proceeding fixing the status of the South Shore, fastening upon it certain obligations, rendering it subject to certain civil liabilities. What more could a final order do?

[fols. 38-39] I cannot avoid the conclusion that here was an order within the intent and purpose of Congress, and that this three judge court has jurisdiction. "We find" that the company is not an electric interurban and "that it is subject to the provisions of the Railway Labor Act". How much stronger would it have been had the Interstate Commerce Commission preceded its final decree by the formal words usually found in a court order "it is therefore ordered"? The real meaning of the Commission's finding is that the plaintiff is not an electric railway, and that it comes under the provisions of the Railway Labor Act, and that it shall be governed accordingly and submit to the regulations of the Mediation Board.

If this is not an order affecting the existing and future status of the Chicago South Shore and South Bend Railroad, it is hard to understand what it really is. Equity does not regard form and should not regard technicalities. It looks through the form to discover the merits. The real merits of this controversy are whether or not the Chicago South Shore and South Bend Railroad is to be governed as a carrier and compelled to comply with all the requirements of the state and federal acts applicable to carriers, or whether it is in truth and in fact an electric interurban or suburban railway.

In my opinion the Interstate Commerce Commission was acting as a quasi-judicial body in making this ruling and order, and that therefore this court has jurisdiction.

[fol. 40] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—Filed September 17, 1937

The above-entitled cause came on to be heard before a three-judge statutory court convened pursuant to the allegations of the petition herein, under the Urgent Deficiencies Act of October 22, 1913, Ch. 32, 38 Stat. L. 208, 219 (28 U. S. C. A., Sec. 41, Sub. 28), said court being composed of Hon. Evan A. Evans, Circuit Judge, and Hon. Robert C. Balzell and Hon. Thomas W. Slick, District Judges, upon the petition, the answer of defendant United States, the answer of the Interstate Commerce Commission, intervening defendant, and evidence introduced on behalf of the respective parties, and the matter having been submitted to [fol. 41] the court for its decision, the court makes and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. That on or about May 17, 1935, pursuant to request made of it by the National Mediation Board, the Interstate Commerce Commission instituted a proceeding entitled Railway Labor Act Docket No. 8, Chicago, South Shore and South Bend Railroad, wherein it undertook to determine whether said railroad was a street interurban or suburban electric railway such as falls within the exemption proviso of Section 1 of the Railway Labor Act, excluding from the force and effect thereof carriers of classes in said section described. That after due notice to all parties and a hearing, in which the Commission heard all the evidence offered by parties interested in said proceeding, the Commission issued a report, which appears as Exhibit A to its answer and

is officially reported 214 I. C. C. 167. That in said report the Commission found and determined that said railroad is not a street interurban or suburban electric railway within the term of said exemption proviso and that it is, therefore, subject to the provisions of said Railway Labor Act.

2. That the petition denominates and describes the Commission's said report, finding and determination as an "order", as said term is used in the Urgent Deficiencies Act of October 22, 1913, above referred to, and prays that said finding and determination be set aside, annulled and suspended and that the enforcement thereof be enjoined. Said petition further invokes the jurisdiction of a statutory three-judge court as provided for in said Urgent Deficiencies Act, pursuant to which this court has been convened.

[fol. 42] 3. That the answers of both defendants deny that said report, finding and determination of the Commission constitute an order as to which a three-judge court has power or jurisdiction under the statute to enjoin, set aside, annul or suspend, and moved that this statutory court dismiss said petition for lack of jurisdiction.

Conclusions of Law

1. The report, finding and determination of the Commission, with respect to the petitioners' railroad, made pursuant to the provisions of the Railway Labor Act, as referred to in the above findings of fact, is not an order of the Commission which, under the terms of the Urgent Deficiencies Act, this statutory court has jurisdiction to enjoin, set aside, annul or suspend.

2. Since this court has no jurisdiction over the subject matter of the petitioners' petition, this suit should be dismissed by this court for lack of jurisdiction.

To each of which said findings of fact and said conclusions of law the petitioners separately and severally object and except.

Evan A. Evans, United States Circuit Judge; Robt. C. Baltzell, United States District Judge; Thos. W. Slick, United States District Judge; Concurring in Findings of Fact and Dissenting as to Conclusions of Law.

[fol. 43] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

In Equity. No. 622

JOHN N. SHANNAHAN and CLAUDE J. JACKSON, as Trustees of the Property of Chicago, South Shore and South Bend Railroad, and Chicago, South Shore and South Bend Railroad, Petitioners,

vs.

UNITED STATES OF AMERICA, Defendant, and INTERSTATE COMMERCE COMMISSION, Intervening Defendant

ORDER OF DISMISSAL—Filed September 17, 1937

This case came on to be heard before a statutory three-judge court convened pursuant to the allegations of the petition, under the Urgent Deficiencies Act of October 22, 1913, on May 18, 1937, at South Bend, Ind., upon the petition and the separate answers of defendants United States and Interstate Commerce Commission and upon evidence introduced on behalf of parties, petitioner and defendant, and the court having heard argument and being fully advised in the premises:

It is thereupon Ordered, Adjudged and Decreed that this court has no jurisdiction over the cause of action stated [fols. 44-45] in the petition and the suit is hereby dismissed for want of jurisdiction, at the cost of the petitioners.

To which the petitioners separately and severally except.

Evan A. Evans, United States Circuit Judge. Robt. C. Baltzell, United States District Judge. Thos. W. Slick, Dissenting, United States District Judge.

[fol. 46] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF EXCEPTIONS—Filed September 17, 1937

Now on this 17th day of September, 1937, the Three Judge Statutory Court makes and files its special findings of fact and conclusions of law herein.

And upon the making and filing of said special findings of fact and conclusions of law come the petitioners and separately and severally except at the time said special findings of fact and conclusions of law are stated and filed by the Court, said exceptions being to the said findings of fact and to each of them and to the said conclusions of law and to each of them.

And now comes said Three Judge Statutory Court and makes, signs and files its final order herein dismissing the suit for want of jurisdiction at the cost of petitioners. And the petitioners come now at the time said order is entered and filed by the Court and separately and severally except thereto.

Forasmuch as the matters and things above set forth do not fully appear of record, the petitioners tender and present the foregoing Bill of Exceptions, and pray that the same may be settled, allowed, signed and sealed and [fols. 47-48] made a part of the record in this cause by the Court, which is accordingly done and ordered this 17th day of September, 1937.

Evan A. Evans, Circuit Judge. Robt. C. Baltzell, Dist. Judge. Thos. W. Slick, Dist. Judge.

Deposited in the Clerk's Office on the 17th day of September, 1937.

Margaret Long, Clerk, Helen Sweeney, Deputy.

[File endorsement omitted.]

[fol. 49] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR A DIRECT APPEAL TO THE UNITED STATES SUPREME COURT—Filed September 17, 1937

On June 22, 1936, John N. Shannahan and Claude J. Jackson, as Trustees of the property of the Chicago South Shore and South Bend Railroad, and Chicago South Shore and South Bend Railroad, filed a petition in the above entitled cause, pursuant to Section 209 of the Judicial Code

(Title 28 U. S. C. A., Sec. 45), in the District Court of the United States for the Northern District of Indiana, South Bend Division, invoking its jurisdiction under Subdivision 28 of Section 41 of Title 28, U. S. C. A. to set aside, annul and suspend the order, finding and determination of the Interstate Commerce Commission made February 14, 1936 (214 I. C. C. 167 to 173), in a proceeding under Section 1 of the Railway Labor Act. (Title 45 U. S. C. A., Sec. 151), determining:

"That the line of the Chicago South Shore and South Bend Railroad is not a street, interurban or suburban elec- [fol. 50] tric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act."

On July 6, 1936, the United States of America filed its answer and thereafter on August 17, 1936, the Interstate Commerce Commission filed its intervening petition and answer.

A special three judge statutory court was convened pursuant to the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913, Chapter 32, 38 Statutes at Large 220 (Title 28 U. S. C. A. Sec. 47). The case was heard in the District Court on May 18, 1937, and on August 16, 1937, an opinion and dissenting opinion were filed. Special findings of fact and conclusions of law were made and filed, and a final decree entered on the 17th day of September, 1937, dismissing the suit for want of jurisdiction.

The said decree is greatly to the prejudice and injury of your petitioners and is erroneous and inequitable and petitioners deem themselves aggrieved thereby for the errors assigned in the accompanying assignments of error filed with this petition.

The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignments of error and prayer for reversal, filed with the clerk pursuant to Rule 9 of the Rules of the United States Supreme Court; and there has been likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rule 12 of the Rules of the United States Supreme Court.

Wherefore, in order that your petitioners may obtain relief in the premises and have an opportunity to show the errors complained of, your petitioners pray for the allowance of an appeal in said cause to the Supreme Court [fol. 51] of the United States agreeably to the statutes and rules of said court in such cases made and provided, and that a proper order touching the security required of the petitioners may be made, that a citation issue and a transcript of the record be made and duly authenticated and sent to the United States Supreme Court, Washington, D. C.

John C. Lawyer, Counsel for Petitioners-Appellants.

In United States District Court

Order Allowing Appeal—Filed September 17, 1937

The petition of John N. Shannahan and Claude J. Jackson, as Trustees of the property of the Chicago South Shore and South Bend Railroad, and Chicago South Shore and South Bend Railroad, petitioners in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from the decree of the District Court of the United States for the Northern District of Indiana, South Bend Division, having been filed herein, accompanied by Assignments of Error and Statement as to Jurisdiction, all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers having been presented to this court and the record in this cause having been considered;

[fols. 52-53] It is Hereby Ordered that said petition be and it is hereby granted and the appeal be and it is hereby allowed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Northern District of Indiana, South Bend Division, and entered in this cause on the 17th day of September, 1937, and that the clerk of this court shall make and transmit to the Supreme Court of the United States under his hand and the seal of the court, a true copy of the material parts of the record herein, which shall be designated by praecipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is Further Ordered that the appellants shall give a bond in the sum of Five Hundred Dollars ($500.00) with good and sufficient surety to be approved by this court, conditioned as required by law;

It is Further Ordered that the bond and the surety thereon for the said sum now submitted by the appellants be and the same is hereby in all respects approved.

Done by the court this 17th day of September, 1937.

Evan A. Evans, Cir. Judge. Robt. C. Baltzell, Dist. Judge. Thos. W. Slick, Dist. Judge.

Whereupon a Citation is ordered issued, which is accordingly now issued.

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 17, 1937

Come now John N. Shannahan and Claude J. Jackson, Trustees of the property of Chicago South Shore and South Bend Railroad, and Chicago South Shore and South Bend Railroad, petitioners, and file the following Assignment of Errors upon which they will rely in the prosecution of the appeal in this cause and say that in the record, proceedings, order and decree entered herein manifest error has intervened to the prejudice of the petitioners in this, to-wit:

1. The court erred in dismissing the suit.

2. The court erred in decreeing that it had no jurisdiction over the cause of action stated in the petition and in dismissing the suit for want of jurisdiction.

3. The court erred in its conclusion of law that the report, finding and determination of the Commission, with respect to the petitioners' railroad, made pursuant to the provisions of the Railway Labor Act, as referred to in the above findings of fact, is not an order of the Commission which, under the terms of the Urgent Deficiencies Act, said statutory court has jurisdiction to enjoin, set aside, annul or suspend.

[fols. 55-56] 4. The court erred in its conclusion of law that it had no jurisdiction over the subject matter of the petitioners' petition, and the suit should be dismissed for lack of jurisdiction.

5. The court erred in concluding that the determination made February 14, 1936, by the Interstate Commerce Commission (214 I. C. C. 167, 173) as follows:

"We find that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act";

is not an order of the Interstate Commerce Commission which the statutory court has jurisdiction to enjoin, set aside, annul or suspend.

Wherefore, petitioners pray that the order and decree may be reversed and for such other and further relief as to the court may seem just and proper.

Dated this 17th day of September, 1937.

John C. Lawyer, Attorney for Petitioners.

[fols. 57-59] Bond on appeal for $500.00, approved and filed September 17, 1937, omitted in printing.

[fol. 60] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL—Filed September 17, 1937

To Margaret Long, Clerk of Said Court:

The Clerk of said Court will please prepare and transmit to the Supreme Court of the United States under his hand and the seal of the United States District Court a transcript of the record in the above entitled suit which has been appealed to the Supreme Court of the United States and include therein the following, to-wit:

1. Placitas and convening order of court.
2. The petition filed June 22, 1936.
3. The answer of the United States filed July 6, 1936.
4. The intervening petition and answer of the Interstate Commerce Commission filed August 17, 1936.
5. Opinion of court and dissenting opinion.
6. Special findings of fact and conclusions of law. Exceptions of Petitioners.

[fol. 61] 7. Decree entered on the 17th day of September, 1937.

8. Petition for appeal.
9. Assignments of Error.
10. Appellants' Statement as to Jurisdiction on Appeal.
11. Order allowing appeal.
12. Appeal bond.
13. Citation on appeal and service thereof.
14. Notice of service of Numbers 8, 9, 10 and 11 on appellees and directing attention to Supreme Court Rule 12(3) with proof of service.
15. Condensed statement of evidence.
16. All other orders or decrees of the court on said cause, if any.
17. This præcipe with attached notice and proof of service.
18. Certificate of Clerk and seal of court.

Said Transcript to be prepared as required by law and the rules of court and filed in the Office of the Clerk of the United States Supreme Court on or before the 27th day of October, 1937.

Dated this 17th day of September, 1937.

John C. Lawyer, Counsel for Petitioners-Appellants.

[fol. 62] IN UNITED STATES DISTRICT COURT

NOTICE OF FILING PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL PURSUANT TO SUPREME COURT RULE 10 AND EQUITY RULE 75; AND NOTICE OF LODGMENT OF CONDENSED STATEMENT OF EVIDENCE AND FIXING TIME FOR APPROVAL, PURSUANT TO EQUITY RULE 75—Filed September 17, 1937

To the Above Named Defendant-Appellee and Intervening Defendant-Appellee, and their Attorneys and Counsel:

You are Hereby Notified:

(a) that we have filed with the Clerk of said court, the above praecipe for transcript of record on appeal.

(b) that we have prepared and lodged in said Clerk's office for the examination of the other parties to this suit, a condensed statement of the evidence to be included in the record of this suit on said appeal as required by Equity Rule 75 and Supreme Court Rule No. 10.

(c) that we have fixed upon the 4th day of October, 1937, and eleven o'clock, A. M., or as soon thereafter as counsel can be heard, at the chambers of Judge Thomas W. Slick in the Federal Building in the City of South Bend, Indiana, as the time and place when we will ask the court or judge to approve said condensed statement of the evidence. A copy of said condensed statement of evidence is attached hereto and made a part hereof.

Dated this 17th day of September, 1937.

John C. Lawyer, Counsel for Petitioners-Appellants.

[File endorsement omitted.]

[fol. 63] PROOF OF SERVICE—Filed September 17, 1937

STATE OF INDIANA,
County of St. Joseph, ss:

John C. Lawyer, being duly sworn, deposes and says that he is one of the attorneys and solicitors for the Petitioners-Appellants in the above entitled cause, and that on the 17th day of September, 1937, at the United States Post Office in South Bend, Indiana, he mailed by depositing in the

United States mail in said Post Office, postage prepaid, an envelope properly addressed to Leo F. Tierney, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., containing a true copy of the above and foregoing praecipe for transcript of record on appeal, and notice of filing same and lodging in the Clerk's office of a condensed statement of evidence to be included in the record on appeal and notice of fixing time for approval thereof, with a true copy of said condensed statement of evidence thereto attached.

Deponent further deposes and says that at the time and place last aforesaid, he mailed by depositing in the United States mail, postage prepaid, an envelope properly addressed to Nelson Thomas, Attorney for Interstate Commerce Commission, Washington, D. C., containing a true copy of the above and foregoing praecipe for transcript of record on appeal, and notice of filing same and lodging in the Clerk's office of a condensed statement of evidence to be included in the record on appeal, and notice of fixing time for approval thereof, with a true copy of said condensed statement of evidence thereto attached.

Deponent further deposes and says that at the time and place last aforesaid he mailed by depositing in the United States mail, postage prepaid, an envelope properly addressed to Luther Swygart, Assistant United States District [fol. 64] Attorney, Hammond, Indiana, containing a true copy of the above and foregoing praecipe for transcript of record on appeal and notice of filing same and lodging in the Clerk's office of a condensed statement of evidence to be included in the record on appeal, and notice of fixing time for approval thereof, with a true copy of said condensed statement of evidence thereto attached.

John C. Lawyer.

Subscribed and sworn to before me this 17th day of September, A. D. 1937. Joseph W. Mikos, Notary Public. My commission expires Dec. 19, 1938. (Seal.)

[File endorsement omitted.]

[fols. 65-67] Citation, in usual form, showing service on Leo F. Tierney et al., filed September 25, 1937, omitted in printing.

[fol. 68] [File endorsement omitted]

[fol. 69] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

In Equity. No. 622

JOHN N. SHANNAHAN and CLAUDE J. JACKSON, as Trustees of the property of Chicago, South Shore and South Bend Railroad, and Chicago, South Shore and South Bend Railroad, Petitioners,

vs.

UNITED STATES OF AMERICA, Defendant, and INTERSTATE COMMERCE COMMISSION, Intervening Defendant.

Condensed Statement of Evidence Heard May 18, 1937, Before a Statutory Three-Judge Court and Upon the Issues Formed by the Petition, Answer of the United States of America and Intervention and Answer of Interstate Commerce Commission—Filed October 4, 1937.

The petitioners introduced the following evidence:

CHARLES H. JONES being duly sworn testified:

My name is Charles H. Jones and I reside in Michigan City, Indiana. I am general manager for the Trustees of the property of the Chicago, South Shore and South Bend Railroad. I was present at all the proceedings with reference to the determination by the Interstate Commerce Commission under the Railway Labor Act of the status of the lines of the Chicago, South Shore and South Bend Railroad and I obtained and have a transcript of all proceedings before the Interstate Commerce Commission certified by the Secretary of the Commission.

The Transcript of the proceedings before the Interstate Commerce Commission, certified by the Secretary of the Commission was offered, admitted and read in evidence as Petitioners' Exhibit No. 1.

[fol. 70] PETITIONERS' EXHIBIT 1.

Petitioners' Exhibit 1 is the transcript of the proceedings before the Interstate Commerce Commission, certified by

George B. McGinty under date of October 2, 1936, and the seal of the Commission attached.

On August 9, 1934, the National Mediation Board, pursuant to Section 1, First, of the Railway Labor Act, as amended June 21, 1934 (45 U. S. C. A. Section 151), requested the Interstate Commerce Commission to determine whether the lines of railroad operated by Chicago South Shore and South Bend Railroad, herein called "South Shore," fall within the terms of the proviso of the first paragraph of said Section, which proviso exempts from the terms of the Act any street, interurban or suburban electric railway unless such railway is operating as a part of a general steam railroad system of transportation. The request also covered the lines of railway operated by eleven other companies.

On May 17, 1935, the Interstate Commerce Commission, pursuant to said request of the National Mediation Board, gave notice to the Chicago South Shore and South Bend Railroad that the matter of determining the status of the South Shore under the proviso of the first paragraph of Section 1 of the Railway Labor Act had been assigned for hearing at the Hotel Morrison, Chicago, Illinois, June 29, 1935.

On June 29, 1935, at 10 o'clock A. M., at the Hotel Morrison in Chicago, Illinois, E. M. Steer, Examiner for the Interstate Commerce Commission, conducted a hearing at which evidence was introduced on behalf of the South Shore, it contending that it is exempt as an interurban, and on behalf of the Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Engineers, Order of Railway Conductors, Brotherhood of Railway Firemen, and other labor organizations.

[fol. 71] Mr. CHARLES H. JONES, General Manager of the South Shore, testified and exhibits were offered in evidence showing the following facts:

The South Shore was incorporated under an act of the State of Indiana entitled "An Act to Provide for the Incorporation of Street Railroad Companies," approved June 4, 1861, and the various acts amendatory thereof and supplementary thereto (Vol. 3, Burns' Ann. Ind. Stat. 1926 Ed., par. 13297, et seq.). Its Articles of Association were filed with the Secretary of State of Indiana and recorded in the Recorder's Office of LaPorte county, Indiana, on June 23, 1925.

The objects and purposes of the South Shore as stated in its Articles of Association are:

"(a) To construct, acquire, own and maintain street railroads, switches and sidetracks upon and through the streets and public ways of the cities and towns, or any of them, hereinafter named;

"(b) To maintain and operate, and to that end to construct, purchase, lease or otherwise acquire, own and control street railroad, interurban street railroad and suburban street railroad lines and systems, or any part or parts thereof, and all property appertaining thereto or to be used in connection therewith, in, through, between and connecting the cities and towns of South Bend, New Carlisle, Hudson Lake, Michigan City, Aetna, Gary, Hammond and East Chicago, or any of them, all in the State of Indiana, and extending to the state line between the states of Indiana and Illinois, and thence to the city of Chicago, Illinois, and extending to the state lines between the State of Indiana and all other states adjacent thereto, or any of them; and lines and systems, or part or parts thereof, of street railroad, interurban street railroad, and suburban street railroad, within the State of Indiana and elsewhere, which connect, or will connect, with the lines and systems of street railroad, interurban street railroad and suburban street railroad of this Company; and to take, transport, carry and convey passengers and property on said railroad lines and systems, and to receive tolls and compensation therefor;"

July 10, 1925, the South Shore was duly admitted to do business in Illinois as a street interurban and suburban railroad.

The South Shore accepted the provisions of the Indiana [fol. 72] General Corporation Act (Vol. 6, Burns' Ann. Ind. St. 1933 Ed., Sec. 25-101 to 25-254), by executing its Articles of Reorganization and filing them with the Secretary of State of Indiana on September 18, 1929, the same being recorded in LaPorte county, Indiana, on October 3, 1929. The powers and purposes are stated in exactly the same language in the Articles of Reorganization as in the Articles of Association above quoted.

The Articles of Reorganization were executed pursuant to the provision of Section 25-245, Volume 6 Burns' Annotated Indiana Statutes, 1933 Edition, which is a part of the General Corporation Act of 1929 of Indiana.

Directors and Officers.

The South Shore has seven directors, a president, two vice presidents, secretary, treasurer and general auditor. Its executive offices are located in Michigan City, Indiana.

Acquisition of Property.

The South Shore purchased the franchises, rights and railroad property it now operates at a foreclosure sale on June 29, 1925, for $6,000,000.

Incorporation of Lake Shore.

The Chicago Lake Shore and South Bend Railway Company, herein called the "Lake Shore," constructed the railroad in 1907 to 1909 and operated it until it was sold at said foreclosure sale. The Lake Shore was incorporated under the laws of Indiana under the name of "Chicago and Indiana Air Line Railway Company," its Articles of Incorporation being filed with the Secretary of State of Indiana on December 2, 1901. Its name was changed October 6, 1904, to "Chicago Lake Shore and South Bend Railway Company" and on October 9, 1924, the name [fol. 73] was changed to "The Chicago Lake Shore and South Bend Railway Company." The Lake Shore was also incorporated under the Act of 1861 for the incorporation of street railroads. Its Articles of Incorporation show its purpose was the

"constructing, owning, maintaining and operating a street railway, including the switches and all the side tracks necessary thereto, in, upon and through the streets, alleys and public ways of the cities of South Bend, in St. Joseph county, Indiana; Michigan City, in LaPorte county, Indiana; East Chicago in Lake county, Indiana; thence into the city of Chicago, Illinois, together with an interurban railway passing between and connecting the cities and towns aforesaid, for the carriage of passengers, mail, express matter and freight."

Franchises

The following cities granted the Lake Shore franchises to lay its tracks at grade in the streets and to operate a street and interurban railway and carry passengers, freight and express, viz: South Bend, New Carlisle, Michigan City, East Chicago, Hammond, and the town of Miller, all in Indiana. Under these franchises the Lake Shore, in 1907 to 1909, built that part of the railway in question located in Indiana.

The Lake Shore surrendered said franchises June 14, 1922, and received an indeterminate permit under the pursuant to the provisions of the Public Service Commission Law of Indiana. The order of the Public Service Commission of Indiana, approved June 14, 1922, in Nos. 6639 to 6644, shows the surrender of said franchises.

The Public Service Commission Act of Indiana provides that any public utility operating under any franchise from any county, city or town within the state of Indiana shall, upon filing at any time prior to July 1, 1923, with the clerk of the county, city or town which granted the franchise and with the Public Service Commission of Indiana, a written declaration legally executed, that it surrenders such franchise, receive by operation of law, in lieu [fol. 74] thereof, an indeterminate permit as provided in said Act.

Vol. 10 Burns' Ind. Stat. Ann., 1933 Ed. Sec. 54-605.

The fact of the surrender of the franchises and that the railroad property is operated under an indeterminate permit and as an interurban street railroad has the right to carry freight upon its tracks was adjudicated by the Supreme Court of Indiana in 1926 in the case of *Chicago Lake Shore and South Bend Railway Company* v. *Guilfoyle,* 198 Ind. 9; 152 N. E. 167; 46 A. L. R. 1465.

Reorganization Proceedings

The South Shore filed its petition No. 972 in the United States District Court at South Bend, Indiana, September 30, 1933, to effect a plan of reorganization under Section 77 of the Acts of Congress Relating to Bankruptcy. The court in said proceeding entered an order approving the petition as properly filed and authorizing and directing the debtor to run and operate the railroad.

South Shore Not Part of a Steam Railroad System.

The South Shore is not connected by stock ownership, directly or indirectly, with any steam railway system in any manner. The South Shore is not operating as a part of a general steam railroad system of transportation.

Construction of Property.

The electric street and interurban railway in question was constructed in 1907 to 1909 from South Bend, Indiana, through New Carlisle, Hudson Lake, Michigan City, Gary, East Chicago and Hammond in the State of Indiana to the Indiana-Illinois State Line in Hammond, and thence northwesterly to the Kensington Station of the Illinois Central Railroad in the south part of Chicago.

[fol. 75] The portion in Indiana, approximately 69 miles, was built by the Lake Shore. The portion between the Indiana-Illinois state line in Hammond and the Kensington Station of the Illinois Central Railroad in Chicago, approximately 6.39 miles, was constructed and owned by the Kensington & Eastern Railroad Company, and the use of it was acquired by the Lake Shore under a contract dated October 18, 1904.

The Illinois Central Railroad Company has a right to operate on the tracks leased by the South Shore from the Kensington & Eastern Railroad Company for about a mile south to Kensington to the icehouse. In one or two emergencies the Illinois Central engines have hauled trains over the leased tracks to Burnham.

Operation

The railroad was operated by the Lake Shore from its construction in 1909 until July 13, 1925, when it was sold through the foreclosure of a mortgage to the South Shore. Since July 13, 1925, it has been operated by the South Shore. Both the Lake Shore and the South Shore have at all times operated all trains and the railway exclusively with electric power and neither at any time has used any other means of operation. From the summer of 1925 to the summer of 1926 when the overhead catenary system of the South Shore was rebuilt there were some construction trains used which were operated by steam. They were used intermittently for about a year. The electric energy for the operation of the trains and railway system of the South Shore is purchased by it from the Northern Indiana Public Service Company.

The South Shore uses a catenary type contact and distribution system, except in the city streets mentioned where there is a direct suspension contact system used. No third rails are used. The voltage used is 1,500 volts, direct current. Its repair shops are maintained at Michigan City. It [fol. 76] makes general repairs on its cars at these shops.

The investment of the South Shore in its said road and equipment is a little over $13,035,058.

Mileage

The mileage between termini operated by the South Shore is as follows:

South Bend, Indiana, to Indiana-Illinois State Line in Hammond	69.19 miles
Illinois-Indiana State Line to Kensington over tracks of the Kensington & Eastern Railroad Company	6.39 miles
Kensington to Randolph Street in Chicago over the tracks of the Illinois Central Railroad Company	14.20 miles
Total between termini	89.78 miles

The first main track consists of 75.37 miles of which 55.11 miles is a single track and 20.26 miles is double track. The second main track consists of 20.26 miles.

The portion in Indiana is owned by the South Shore with the exception of trackage rights for .21 of one mile over the Northern Indiana Railway, Incorporated, in South Bend, Indiana. The portion between the Illinois-Indiana State Line to Kensington is operated over the Kensington & Eastern Railroad Company's tracks by virtue of the contract of October 18, 1904, above mentioned.

The portion between Kensington in Chicago and Randolph Street in Chicago is operated over the electrified suburban tracks of the Illinois Central Railroad Company under a trackage contract. The rights of the South Shore are confined to that portion of the elevated tracks of the Illinois Central Railroad Company which are used by it for electrified suburban service.

The South Shore operates through the city streets of the cities of East Chicago, Michigan City and South Bend. The [fol. 77] mileage in the streets of each of said cities is as follows:

In South Bend, Indiana	1.95 miles
In Michigan City, Indiana	2.42 miles
In East Chicago, Indiana	1.61 miles
Total mileage in city streets	5.98 miles

or 6.6 per cent of the mileage between South Bend and Randolph Street in Chicago.

Right of Way

The South Shore operates over 62.98 miles of right of way owned by it, the width of which varies, but the greater portion is 66 feet in width. The greater portion of the right of way was purchased, but a considerable portion was acquired by exercise of the power of eminent domain.

The laws of Indiana, Act of 1901, give a street and interurban railroad the right and power of eminent domain to condemn a right of way four rods wide. Vol. 10, Burns' Ann. Ind. Stat. 1933 Ed. Sec. 55-3601.

Tracks, Roadbed and Bridges

All of the tracks are standard gauge, that is 4 feet 8½ inches wide.

The maximum grade is 2½ per cent with the current of traffic. The ruling grade is level. The maximum curvature is 10 degrees. The roadbed is generally ballasted with gravel and although it compares favorably with the ballast of steam railroads in the same vicinity it is not equal to that of the large trunk line steam railroads.

The South Shore uses creosoted oak ties. It uses a standard "T" rail. The greater portion of the rails used weigh 100 pounds per yard, but there are some weighing 70, 90 and 130 pounds per yard. There are two short sections of gauntlet rail over two single track bridges. The rails are bonded for electrical transmission.

[fol. 78] The bridges of the carrier are of truss and through girder type. They are built according to Cooper's Specifications for Bridges E-35 and E-50. There is a bridge in Chicago Avenue in East Chicago, Indiana, over which the tracks of the railroad extend and this bridge belongs to the city of East Chicago. It is also used for street and auto traffic.

Signal and Protective Devices

The South Shore uses track circuit color light block signals and flashing light crossing protecting devices. The trains are operated under orders and block signals. It does not have cattle guards along its line.

The South Shore uses interlocking signal devices in connection with other carriers as follows:

Michigan City—electric interlocking plant with the Michigan Central and Monon Railroads;
East Chicago—mechanical interlocking plant with the Indiana Harbor Belt and the Elgin, Joliet & Eastern Railroads;
Ind.-Ill. St. Line—electric mechanical interlocking plant with Indiana Harbor Belt and Western Indiana Railroads;
Burnham—electro mechanical interlocking plant with the Pennsylvania and Western Indiana Railroads;
Kensington—electric interlocking plant with the Illinois Central Railroad.

Passenger Operations

The South Shore maintains passenger stations and agents at South Bend, Michigan City, Beverly Shores, Tremont, Gary, East Chicago, Hammond, Hegewisch, and has use of the Illinois Central passenger stations at Kensington, 63rd Street, 53rd Street, Roosevelt Road, Van Buren Street and Randolph Street in Chicago. It maintains all necessary [fol. 79] facilities for the convenience of passengers in its stations.

It has 62 passenger cars, 49 of which are motor cars and the balance trailers. Its passenger cars are of the type generally used by interurban railways. The cars seat from 44 to 56 passengers, while the cars of steam railroads seat from 76 to 98 passengers. It has two dining cars and four parlor cars not in use. It has no Pullman cars, no express cars and no baggage cars. Ten of the passenger cars have baggage compartments.

The only through passenger tickets sold by the South Shore are over the Illinois Central Railroad and the Chicago, Indianapolis and Louisville Railroad. It does not sell through Pullman tickets. It carries baggage and express packages. It does not carry the United States Mail.

The South Shore participates in a few isolated cases in joint passenger fares with steam railroads, namely, Illinois Central and the Monon. The passenger traffic originating on other lines and interchanged is less than one-half of one per cent of the passenger revenue of the South Shore.

The South Shore interchanges passes with standard carriers which it has a right to do under the case of United States v. Erie, 236 U. S. 259, at 267 to 272; 59 L. Ed. 567, at 571-3, which holds that carriers subject to the Interstate Commerce Act may issue passes to officers, agents and employes of carriers not subject to the act.

The freight is handled by electric engines. The passenger trains are multiple type motor cars and no electric engines are used to pull passenger trains.

Most South Shore passenger trains are one coach. Four [fol. 80] or five trains are longer. Steam trains run up to 12 and 15 cars. On one rare exception the South Shore had 20 passenger coaches in a train. The maximum in normal times is from 2 to 6. Excursion trains are about 10 coaches long. Traffic requires trains of from 1 to 12 passenger cars at different periods of time.

From Chicago to South Bend the South Shore parallels the New York Central. It competes with the Michigan Central from Michigan City into Chicago. The South Shore makes country stops for passengers between towns. The South Shore advertises its freight and passenger service.

The local passenger fare on the South Shore is 3.6 cents per mile. It operates passenger trains each day as follows:

18 through trains from South Bend to Chicago;
19 through trains from Chicago to South Bend;
2 trains from Michigan City to Chicago;
1 train from Chicago to Michigan City;
12 trains from Gary to Chicago;
12 trains from Chicago to Gary;
Total 64 trains daily. The railroad time tables were introduced.

Freight Operations

Freight stations and agents are maintained at Kensington, Hammond, East Chicago, Gary, Michigan City and South Bend. It has switch tracks at said stations and also at Hegewisch.

The South Shore has facilities for the interchange of standard steam railroad freight equipment in carload lots without breaking bulk with the following steam railroads:

With New York Central, Monon and Nickel Plate at South Bend;
With Michigan Central at Michigan City;
With Elgin, Joliet & Eastern at Goff (Gary);
With Pennsylvania and Wabash at Gary;
With Indiana Harbor Belt, Baltimore & Ohio Chicago Terminal Railroad at East Chicago;
[fol. 81] With Western Indiana and Belt Railroad of Chicago at Hegewisch;
With Pullman Railroad and Illinois Central at Kensing ton.

The capacity of the interchange tracks for interchange with the roads above mentioned is from about 15 to 50 cars.

The South Shore has 15 industrial side tracks serving industries as follows:

6 in South Bend.
5 in Michigan City.
2 between Michigan City and Gary.
1 in Gary.
1 in Hegewisch.

It has freight yards for storage of cars at South Bend, Michigan City and Burnham.

The South Shore does not maintain any classification yards but does such work upon its interchange and storage tracks.

The South Shore has 12 electric locomotives of 85 tons each, and 2 electric locomotives of 50 tons each for the hauling of freight. It has no steam locomotives and no electric storage battery locomotives. It has one merchandise dispatch car. It has no refrigerator cars. The South Shore has 16 revenue freight cars and 6 material cars. This equipment is interchangeable with steam railroads. The South Shore has never used steam locomotives.

Less than carload freight (l.c.l.) is accepted at the Kensington station for delivery to other carriers. Employes are required to be familiar with the general rules as to packing, labeling and handling l.c.l. freight. The l.c.l. freight has dropped to nearly zero, practically all having been diverted to trucks.

A large portion of the freight cars handled belong to [fol. 82] other carriers. The South Shore makes such repairs as are absolutely necessary to send foreign cars home. The expense of the repairs is billed under rules of American Railway Association (A.R.A.) to the owning carriers. This agreement is reciprocal. About 100 foreign cars are repaired per month.

Coal is received from connecting carriers and hauled over the South Shore lines and delivered at Kensington to the Illinois Central. The coal is delivered about equally to the Indiana Harbor Belt at Hegewisch and the Western Indiana and Illinois Central at 124th Street.

The number of cars in a freight train is limited by the trailing load of approximately 4,000 tons. This is generally about 40 to 55 cars, although it may run up to 60 or 70 cars. The freight traffic is generally carload business of mixed variety, but the predominating commodity is coal. The coal is received from steam railroads from the east and south. The South Shore handles grain and merchandise. The grain originates on steam roads in the Minneapolis territory and is delivered to eastern carriers. About 90 per cent of the freight traffic is interstate. About 90 per cent of the traffic is interchanged with steam railroads. The South Shore participates in joint freight tariffs, but those applying generally to points throughout the country are a relatively small part of the total.

The acts of 1920 of Indiana, Chapter 6, Section 1, page 32, give all interurban railways the right to haul freight. This section appears in Volume 10, Burns' Indiana Statutes Annotated, 1933, Section 55-3602, and is as follows:

"*All interurban railway companies* now or hereafter organized and operating or which may hereafter operate in this state, in addition to the rights, privileges and powers already given and granted by law to such companies, *are hereby empowered to transport over their respective roads* [fol. 83] and over the tracks of all street and interurban railways over which they have traffic contracts, and over, across and along and upon all highways, streets and alleys, and public places occupied by such roads and tracks, or which may, in the future, be occupied by them, *all classes of freight,* subject, however, to the rules and regulations of the public service commission of Indiana."

Tariffs.

The South Shore files freight and passenger tariffs with the Interstate Commerce Commission, the Public Service Commission, of Indiana, and the Illinois Commerce Commission. It maintains its own tariff bureau. It files concurrences with the Interstate Commerce Commission and Illinois and Indiana State Commissions.

It has in effect 22 local freight tariffs and 9 joint freight tariffs. It has filed concurrences under which it participates with 124 railroads in carrying freight routed over its lines.

It has 19 local passenger tariffs and one interline passenger tariff. It is a participating carrier under 4 passenger tariffs of other railroads.

The South Shore reports, for publication in Dunn's freight tariff, information as to restrictions on transportation by rail of explosives and other dangerous articles by freight, pursuant to 18 U. S. Code Ann. 383, which applies to all common carriers in interstate commerce.

Development of Freight Business

The South Shore had no freight business prior to 1916. A comparison of passenger and freight revenue is as follows:

Year	Passenger Revenue	Freight Revenue
1909	$133,456	None
1910	278,944	None
1911	286,803	None
1912	320,746	None
1913	413,098	None
1914	359,062	None
1915	335,058	None
1916	449,070	$4,807
[fol. 84] 1917	516,668	27,845
1918	581,231	56,295

Year	Passenger Revenue	Freight Revenue
1919	630,629	89,941
1920	675,226	171,732
1921	577,601	148,904
1922	598,355	241,268
1923	690,007	230,367
1924	620,101	172,924
1925	599,236	189,263
1926	750,539	249,138
1927	1,640,506	589,963
1928	1,756,636	1,227,581
1929	2,026,664	1,546,263
1930	1,856,825	1,596,246
1931	1,332,101	1,456,714
1932	827,839	957,419
1933	806,512	812,008
1934	832,320	922,227

The percentage of operating revenues derived from the transportation of freight was greatest in the year 1932, when the revenue from freight was 51.45 per cent of the total operating revenues of the South Shore. Before and since 1932 the percentage has been less. The gross revenues of all Class 1 railroads in the United States, as a whole, amounted to $3,095,448,888 in 1933 and of this amount the passenger revenues were $329,341,854, or 10.6 per cent.

In 1920 passenger revenues of Class 1 railroads in the United States were apparently at the peak. In that year the total operating revenues of the Class 1 railways of the United States were $6,178,438,459, of which the passenger revenue was $1,288,503,573, or 20.8 per cent.

The percentage of operating revenues from the transportation of freight received by the South Shore at its peak was far less than the steam railroads enjoyed.

Federal Control

The South Shore was not under federal control during the World War or subsequent thereto.

Restriction on Carrying Livestock

The South Shore does not carry horses, cattle, hogs, or [fol. 85] any kind of livestock over its railway. Six miles of its right of way were obtained through sections 1, 2, 3, 4, 5 and 6 in township 36 north, range 8 west of the second principal meridian in Gary, Lake county, Indiana, by purchase of a strip 66 feet wide through said sections from Gary Land Company under a deed dated February 19, 1908, and recorded June 25, 1908, in the Recorder's office of Lake county, Indiana, in book 137, at page 130, et seq., and the said deed provides that it is an express condition that no horses, cattle, hogs or any kind of livestock shall ever be carried on or over said strip of land, that said strip shall be used for no other purpose than a street and interurban electric road.

Employes.

Employes of the South Shore who cperate trains stand examination on the rules. They take the standard railroad examination. They take a physical examination. Where they operate on the tracks of the Illinois Central Railroad Company, employees are required to take an examination on the rules of that company.

The South Shore has 25 passenger crews and 5 freight crews.

The average number of South Shore employes per year for the ten years from 1925 to 1934, inclusive, was highest in 1928 when there were 832 and lowest in 1934 when there were 463.

Year	Average Number of Employes
1925	681
1926	693
1927	689
1928	832
1929	829
1930	682
1931	637
1932	492
1933	467
1934	463

Contention of South Shore

The Railway Labor Act, approved May 20, 1926, as amended, was never intended by Congress to include, and does not include, interurban electric railways, such as the South Shore. The electric interurban railways have no [fol. 86] representation on the National Railroad Adjust-

ment Board established by the Act. The representatives of the carriers on the National Railroad Adjustment Board were chosen by the steam railroads and the interurban electric railways had no voice in selecting the representatives of the carriers on the National Railroad Adjustment Boards.

The South Shore was denied membership in the Central Passenger Association and Central Freight Association because it was an electric railroad. It is an associate member, with no voting rights, in the American Railway Association now Association of American Railroads.

The South Shore is an interurban electric railway and interurban electric railways are not included in, and in fact are excluded from, the provisions of the Railway Labor Act of the United States.

The labor organizations called witnesses to testify as follows:

HUGH SUTTON:

I reside at Michigan City, Indiana, and am passenger conductor on the South Shore. The greater portion of the business handled is interchange freight originating off the line. I think about 90 per cent of the freight originates off the line. The employes take a standard railroad examination.

Coal is exchanged with the Illinois Central at 124th Street or Kensington. Coal is delivered to the Indiana Harbor Belt Railroad. It is also delivered at South Bend through the New York Central and at Michigan City through the Nickel Plate and the Monon. It could be delivered by steam roads independently of the South Shore.

H. J. LOCHMAIER:

I reside at Michigan City, Indiana. The South Shore con-[fol. 87] nects with about 11 different steam railroads at 10 different points. Freight trains are sometimes 60 cars and sometimes 80 empties. The average day is 12 hours and no overtime is paid until after 12 hours. The employes are required to take physical examinations.

The South Shore operates over 14 miles of the Illinois Central in Chicago. I am an engineer on the South Shore.

JACOB M. RITCHIE:

I reside at Michigan City, Indiana. I am a conductor in the passenger service on the South Shore. I have been in the freight service.

The Illinois Central tracks are elevated and the freight and passenger tracks of the Illinois Central are on the same level. About 75 to 90 per cent of the freight business originates off the line. Perhaps not more than one-half of 1 per cent of the passenger business originates off the line. I think the South Shore is a half breed between an interurban and a railroad.

The South Shore passenger trains are 1 coach, four or five of them are longer, while steam railroads run 12 to 15 cars. The South Shore is less than half in that respect. 20 passenger coaches is the maximum handled in one train. On the average there are not more than 2 coaches and normally the maximum is not more than 5 or 6 coaches. Only on one rare exception was there 20 coaches. That was unusual. Excursion trains usually have no more than 10 coaches.

I have worked on steam railroads for 10 years before I came to the South Shore. I commenced railroad work in 1900.

Between Chicago and South Bend the South Shore parallels the New York Central Railroad. The South Shore makes passenger stops between towns in the country and at road crossings.

W. W. MCKIRCHY:

The Brotherhood of Railroad Trainmen contends that [fol. 88] the South Shore is not an interurban. Since the year 1930, freight revenues have consistently exceeded passenger revenues. We contend that under the Piedmont and Northern Railway Company v. Interstate Commerce Commission, 286 U. S. 299, the South Shore is not an interurban. We call attention to the decisions of the Interstate Commerce Commission in Waterloo, Cedar Falls and Northern Railway, The Texas Electric Railway and Sacramento Northern Railway, in which the Commission recently decided that they were not interurbans, and on May 13, 1935 entered an order denying a petition for rehearing. We offer the advertisement in the Official Railway Guide, page 1118, which shows the connection of the South Shore with freight service. The South Shore connects with the New York Central at South Bend, the Michigan Central, Monon and Nickel Plate at Michigan City, Pennsylvania and Wabash at Gary, E. J. & E. at Goff Junction, Gary, Indiana Harbor Belt and B. & O. C. T. at East Chicago, Chicago and Calumet River Railroad at Hegewisch, and Illinois Central and Pullman Railroad at Kensington. Through rates are published in principal tariffs and apply by way of principal railroads.

It advertises 64 passenger trains each day between Chicago, Hammond and East Chicago and 66 daily to Gary, and 36 daily between Chicago and South Bend.

E. K. HOGAN:

I am general vice president of the Brotherhood of Railway Firemen.

The I. C. C. reports indicate that the revenue from passenger and freight is about a 50-50 proposition. About 100 foreign cars receive repairs in a month in the South Shore shops.

In my opinion the South Shore is a part of the general steam system of transportation.

[fol. 89] R. H. HAUSER:

I am a motorman, have been for 11 years. There are 25 passenger crews and 5 freight crews. The South Shore operates under train orders and block signals.

I am in the passenger service. The passenger trains are from 1 to 12 cars, whatever is required. In freight service the maximum number of cars has been 87. A good many of them were empties. Generally the freight trains are 40 to 55 cars.

RECITAL AS TO SOUTH SHORE EXHIBIT 1

Exhibit 1 of the South Shore was admitted in evidence containing 14 documents, being time tables, annual reports, indeterminate permit, articles of incorporation, amendments thereto, admission to do business in Illinois, receipts for

6 years, 1929 to 1934, revenue, expenses and income for 5 years, 1930 to 1934, and passenger and freight revenue from 1909 to 1934.

The hearing before Examiner Steer was closed on June 29, 1935.

The foregoing was all the evidence offered before the Interstate Commerce Commission and briefs were filed by the South Shore on August 7, 1935 and by the labor organizations on August 10, 1935. Oral arguments were held on November 19, 1935 and on December 30, 1935, John N. Shannahan and Claude J. Jackson, as Trustees of the property of Chicago South Shore and South Bend Railroad filed their written appearance in the proceedings.

Report and Order

On February 14, 1935, the Interstate Commerce Commission filed its report (214 I. C. C. 167 to 173). The report recites the proceedings and summarizes the evidence, and concludes as follows:

"We find that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban, or subur- [fol. 90] ban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act."

A printed copy of the report is attached to the answer of the Interstate Commerce Commission filed in this suit on August 17, 1936.

On April 11, 1936, the South Shore filed its petition for rehearing and the labor organizations filed a reply on April 15, 1936, and on May 11, 1936 the Commission entered its order as follows:

"Railway Labor Act Docket No. 8

Chicago South Shore and South Bend Railroad

Upon consideration of petition for rehearing by the above named railroad and the trustees of its property, also a reply to such petition on behalf of the Railway Labor

Executives' Association and other labor organizations, and further consideration of the record herein:

It is ordered, That said petition be, and it is hereby, denied."

Counsel for the South Shore on September 25, 1936, filed a præcipe with the Secretary of the Interstate Commerce Commission requesting a complete authenticated transcript of the record in the proceedings under Railway Labor Docket No. 8 on the request of the National Mediation Board to determine the status of the South Shore under the proviso of the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934.

The foregoing is a condensed statement of Petitioners' Exhibit 1, being the transcript of the proceedings before the Interstate Commerce Commission.

On the trial before the three judge court, petitioners' witness Charles H. Jones continued his testimony as follows:

[fol. 91] As general manager for the Trustees, I have had correspondence with the National Railroad Adjustment Board concerning labor matters under the Railway Labor Act.

Petitioners' Exhibit No. 2 is a letter dated February 18, 1937, which I received from H. A. Johnson, Secretary of the Third Division of the National Railroad Adjustment Board.

Petitioners' Exhibit No. 3 is a copy of the my reply dated February 19, 1937, and Petitioners' Exhibit No. 4 dated March 19, 1937, is a letter from Mr. H. A. Johnson, Secretary of the Third Division, National Railroad Adjustment Board in reply to my letter of February 19, 1937.

Petitioners' Exhibit Nos. 2, 3 and 4 were offered, admitted and read in evidence.

PETITIONERS' EXHIBIT 2

Petitioners' Exhibit No. 2, letter of H. A. Johnson dated February 18, 1937, states that the National Railroad Adjustment Board, Third Division, has received notice from the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees of intention to

file within thirty (30) days ex parte submissions involving unadjusted disputes, namely:

(1) Claims of employees for restoration of two positions of freight ticket clerks at Hegewisch, Illinois, and reimbursement for all wage losses suffered by the regular assigned incumbents thereof, retroactive to March 26, 1936;

(2) Claim of R. W. Downey, Ticket-Freight Clerk, East Chicago, Indiana, and other incumbents of that position for the difference between $4.41 per day and $4.71 per day from March 26, 1936 to April 30, 1936 on account of rate reduction;

(3) Claim of the System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, etc., that station porters be classed as station janitors and their names placed on seniority rosters;

[fol. 92] (4) Claim of the System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, etc., that failure and refusal to issue seniority roster and furnish copy of same is in violation of Clerk's Agreement.

The letter requests the Carrier to file with the Third Division of the National Railroad Adjustment Board within thirty days fifteen copies of its submission.

PETITIONERS' EXHIBIT 3

Petitioners' Exhibit No. 3, letter of General Manager for Trustees dated February 19, 1937, to Secretary of the National Railroad Adjustment Board, Third Division, acknowledging receipt of Petitioners' Exhibit No. 2 and advising that the Carrier is in reorganization under Section 77 of the Bankruptcy Law and that its Trustees have, by authority of the court, instituted legal proceedings to determine the status of the railroad as an interurban and if the court sustains the contention of the Carrier that it is an interurban it is exempt from the Railway Labor Act and that pending such final determination no further statements should be required.

PETITIONERS' EXHIBIT 4

Petitioners' Exhibit No. 4, letter of H. A. Johnson, Secretary of National Railroad Adjustment Board, dated March 9, 1937, acknowledges receipt of letter of Charles H. Jones, General Manager for Trustees, dated February 19, 1937, and states that:

"Under the Amended Railway Labor Act, the Interstate Commerce Commission is empowered to determine whether any line operated by electric power falls within the terms of the Act. It appears that the Commission has *determined* by appropriate *order*, that the Chicago, South Shore and South Bend Railroad falls within the terms of the Act, therefore said Board is empowered to hear the disputes which have been submitted and you are requested to file your submission in accordance with my letter of February 18, 1937."

[fol. 93]

PETITIONERS' EXHIBIT 5

Petitioners' Exhibit No. 5, read in evidence, is the petition of the Trustees filed December 27, 1935 and the order of this court authorizing the Trustees to enter their appearance in the proceedings before the Interstate Commerce Commission to determine the status of the Carrier as an interurban railway under the Railway Labor Act.

PETITIONERS' EXHIBIT 6

Petitioners' Exhibit No. 6, read in evidence, is the petition and order of this court entered May 27, 1936, authorizing the Trustees to commence and prosecute the present proceedings.

PETITIONERS' EXHIBITS 7 AND 8

Petitioners' Exhibit No. 7 is the petition filed September 30, 1933 by the Chicago, South Shore and South Bend Railroad under Section 77 of the Bankruptcy Act in the United States District Court in the Northern District of Indiana, South Bend Division, for reorganization, and Petitioners'

Exhibit No. 8 is the order of said court entered September 30, 1933, approving the petition for reorganization as properly filed and continuing the Carrier in possession without the appointment of Trustees.

Petitioners' Exhibit 9

Petitioners' Exhibit No. 9 is the order of this court entered September 30, 1935, appointing John N. Shannahan and Claude J. Jackson, Trustees of the Property of the Chicago, South Shore and South Bend Railroad.

Petitioners' Exhibit 10

Petitioners' Exhibit No. 10 is the report and order of the Interstate Commerce Commission entered September 30, 1935, approving the appointment of said Trustees.

Petitioners' Exhibit 11

Petitioners' Exhibit No. 11 is the bond of the Trustees and order of this court approving the same entered November 1, 1935.

Petitioners' Exhibit 12

Petitioners' Exhibit No. 12 is the report and order of the Interstate Commerce Commission entered April 16, [fol. 94] 1936 (212 I. C. C. 547) approving a plan for the reorganization of the Chicago, South Shore and South Bend Railroad and a supplemental report and order modifying the decree entered October 20, 1936 (217 I. C. C. 423).

Petitioners' Exhibit 13

Petitioners' Exhibit No. 13 is the Certificate of the Interstate Commerce Commission made April 17, 1937, showing that the Plan of Reorganization has been duly accepted by the required number of creditors and stockholders.

PETITIONERS' EXHIBIT 14

Petitioners' Exhibit No. 14 is the order of this court entered May 1, 1937 setting the hearing on the confirmation of the Plan of Reorganization for June 18, 1937.

And here the petitioners rested and the foregoing was all the evidence introduced in said suit.

ORDER APPROVING STATEMENT OF EVIDENCE

The foregoing statement of evidence is in all respects hereby approved and settled as a true, complete and properly prepared statement of the evidence adduced on the trial of the above entitled suit to the end that the same may become a part of the record in said suit on appeal.

Dated this 4 day of October, A. D. 1937.

Thos. W. Slick, Judge.

Deposited in the Clerk's Office on the 17th day of September, 1937.

Margaret Long, Clerk, Helen Sweeney, Deputy.

[File endorsement omitted.]

[fol. 95] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 96] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF RECORD TO BE PRINTED PER RULE No. 13 —Filed October 14, 1937

Comes now the Appellants in the above entitled cause and adopt their assignments of error as their statement of the points to be relied upon, and state that the whole of the record, as filed is necessary for a consideration of the cause.

Dated this 12th day of October, 1937.

John C. Lawyer, R. Stanley Anderson, Counsel for Appellants.

[fol. 97] Proof of Service

STATE OF INDIANA,
County of St. Joseph, ss:

John C. Lawyer, being duly sworn, deposes and says that he is one of the attorneys and solicitors for the Appellants in the above entitled cause and that on the 12th day of October, 1937, at the United States Post Office in South Bend, Indiana, he mailed by depositing in the United States mail in said Post Office, postage prepaid, an envelope properly addressed to Leo F. Tierney, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., containing a true copy of the above and foregoing statement of points to be relied upon and designation of the parts of the record to be printed in said above entitled cause.

Deponent further deposes and says that at the time and place last aforesaid, he mailed by depositing in the United States mail, postage prepaid, an envelope properly addressed to Nelson Thomas, Attorney for Interstate Commerce Commission, Washington, D. C., containing a true copy of the above and foregoing statement of points to be relied upon and designation of the parts of the record to be printed in said above entitled cause.

Deponent further deposes and says that at the time and place last aforesaid, he mailed by depositing in the United States mail, postage prepaid, an envelope properly addressed to Luther Swygert, Assistant United States District Attorney, Hammond, Indiana, containing a true copy of the above and foregoing statement of points to be relied upon and designation of the parts of the record to be printed in said above entitled cause.

John C. Lawyer.

Subscribed and sworn to before me this 12th day of October, 1937. C. W. *Meoley*, Notary Public. My commission expires 8/12/38. (Seal.)

[fol. 98] [File endorsement omitted.]

Endorsed on cover: File No. 41,983. N. Indiana, D. C. U. S. Term No. 502. John N. Shannahan and Claude J. Jackson, as Trustees of the Property of Chicago, South Shore and South Bend Railroad, et al., appellants, vs. The United States of America and Interstate Commerce Commission. Filed October 14, 1937. Term No. 502, O. T., 1937.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 14 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 502

JOHN N. SHANNAHAN and CLAUDE J. JACKSON, as Trustees of the Property of Chicago, South Shore and South Bend Railroad et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

INDEX.

SUBJECT INDEX.

Page

Statement as to jurisdiction 1
  Statutory provisions sustaining jurisdiction . . . 2
  Statute involved 2
  Date of decree and date of application for appeal 2
  Nature of case 2
  Cases believed to sustain jurisdiction 3
Exhibit "A"—Opinion of the District Court of the United States for the Northern District of Indiana 4

TABLE OF CASES CITED.

Alton v. *U. S.*, 287 U. S. 229, 77 L. Ed. 275 3
B. & O. Railway v. *U. S.*, 264 U. S. 258, 68 L. Ed. 667 3
Claiborne-Annapolis Ferry Co. v. *U. S.*, 285 U. S. 382, 76 L. Ed. 808 3
Colorado v. *U. S.*, 271 U. S. 153, 70 L. Ed. 878 3
Powell v. *U. S.*, 300 U. S. 276, 81 L. Ed. 423 3
Shannahan et al. v. *U. S. et al.*, 214 I. C. C. 167 2
U. S. v. *New River Co.*, 265 U. S. 533, 68 L. Ed. 1165 . 3

STATUTES CITED.

Judicial Code, Section 209 (28 U. S. C. A. 45) 2
Judicial Code, Section 238 (28 U. S. C. A. 345) 2
Railway Labor Act, Section 1 (45 U. S. C. A. 151) . . . 2
Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large 220 (28 U. S. C. A. 47) . . . 2, 3

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

IN EQUITY.

No. 622

JOHN N. SHANNAHAN AND CLAUDE J. JACKSON, AS TRUSTEES OF THE PROPERTY OF CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD AND CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Defendant,

AND

INTERSTATE COMMERCE COMMISSION,

Intervening Defendant.

STATEMENT AS TO JURISDICTION ON APPEAL.

Pursuant to Rule 12 of the Supreme Court of the United States, the petitioners in support of the jurisdiction of the

Supreme Court to review the judgment, order and decree in question, respectfully represent:

A.

The Judicial Code, Section 238 (Section 345, Title 28, U. S. C. A.) and the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large 220 (Section 47, Title 28 U. S. C. A.) provide that an appeal may be taken direct to the Supreme Court of the United States from the final decree in any suit brought to set aside, annul or suspend an order of the Interstate Commerce Commission.

B.

In a proceeding under Section 1 of the Railway Labor Act (Title 45, U. S. C. A., Section 151) the Interstate Commerce Commission on February 14, 1936 (214 I. C. C. 167, 173) ordered, found and determined as follows:

> "We find that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act."

C.

The decree sought to be reviewed was entered on the 17th day of September, 1937.

The application and petition for appeal was presented on the 17th day of September, 1937.

D.

Pursuant to Section 209 of the Judicial Code (Title 28, U. S. C. A., Section 45) a petition was filed in the District Court of the United States for the Northern District of

Indiana, South Bend Division, invoking its jurisdiction under subdivision 28 of Section 41 of Title 28, U. S. C. A., to set aside, annul and suspend the said order, finding and determination of the Interstate Commerce Commission made February 14, 1936.

A three judge statutory court was convened pursuant to the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913, Chapter 32, 38 Statutes at Large 220 (Title 28, U. S. C. A., Section 47). The case was heard in the District Court by three judges and a final decree entered on the 17th day of September, 1937, dismissing the suit for want of jurisdiction, one judge dissenting.

E.

The following decisions are believed to sustain jurisdiction of this appeal:

Claiborne-Annapolis Ferry Co. v. *U. S.*, 285 U. S. 382, at 390-391, 76 L. Ed. 808 at 814;

Colorado v. *U. S.*, 271 U. S. 153, 161, 70 L. Ed. 878, 882;

Alton v. *U. S.*, 287 U. S. 229, at 237, 77 L. Ed. 275, 281;

U. S. v. *New River Co.*, 265 U. S. 533, 539, 540, 541, 68 L. Ed. 1165, 1171-2;

Powell v. *U. S.*, 300 U. S. 276, 284, 285, 81 L. Ed. 423, at 427-8;

B. & O. Railway v. *U. S.*, 264 U. S. 258, at 262, 264-5, 68 L. Ed. 667.

We respectfully submit that the United States Supreme Court has jurisdiction of this appeal.

Respectfully submitted,

JOHN C. LAWYER,
Counsel for Petitioners.

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION.

Filed at — M. Aug. 16, 1937. Margaret Long, Clerk U. S. District Court.

Equity No. 622.

JOHN M. SHANNAHAN and CLAUDE J. JACKSON, as Trustees of the Property of Chicago South Shore and South Bend Railroad, and CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Defendant.*

Before Evans, Circuit Judge, and Baltzell and Slick, District Judges.

Views of the Majority of the Court, Evans and Baltzell.

On February 14, 1936, the Interstate Commerce Commission filed its report in writing which contained, among other things, the following paragraph:

> "We find that the line of the Chicago, South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act."

The report appears in 214 I. C. C. 167-173.

Preceding this finding is a statement which sets forth the proceedings of the Interstate Commerce Commission and a resume of the evidence received on the hearing.

The petitioners brought suit against the United States to enjoin, by temporary restraining order and interlocutory preliminary injunction, the "Interstate Commerce Commission from making or entering the aforesaid order, finding, and determination that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended, and that said order be set aside, annulled and suspended."

The Interstate Commerce Commission intervened.

The determinative question is one of jurisdiction.

Is the case one for the determination of a three judge statutory court? The answer to this question turns upon the character of the ruling which was made by the Interstate Commerce Commission.

A three judge statutory court is one of limited jurisdiction. Procter & Gamble *v.* United States, 225 U. S. 282; United States *v.* Atlanta, Birmingham & C. R. Co., 282 U. S. 522; United States *v.* Los Angeles & S. R. R. Co., 273 U. S. 299; Great Northern Ry. Co. *v.* U. S., 277 U. S. 172; Pittsburgh & West Va. Ry. Co. *v.* U. S., 281 U. S. 479.

Its jurisdiction is limited to "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." Section 207 of the Judicial Code, U. S. C. Title 28 Sec. 41 (27) and (28).

We are therefore first called upon to determine whether the report of the Interstate Commerce Commission was an order of that body.

It may be readily conceded that it is not the name which the Commission gives to its action or to the document which evidences its action that determines whether it is a finding, a report, or an order. For example, the Interstate Commerce Commission may call an order a report or the report may call an order a finding. Likewise, counsel may call a finding an order or a conclusion, a finding. Courts are not interested in the names used, but in the action taken by the Interstate Commerce Commission.

The Supreme Court cases cited above apply to instances where a report was held not to contain an order. In United States *v.* Los Angeles R. R. Co., *supra,* it is said:

> "The final report on value, like the tentative report, is called an order. But there are many orders of the

> Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act."

An examination of the entire report fails to show wherein the Interstate Commerce Commission made any order or direction to the carrier. It made a finding. Later it may make an order upon that finding. Likewise, it may modify its finding or withdraw it. Until an order, however, is made upon the finding, a three judge court is without jurisdiction to act. Such a court may "enjoin, set aside, annul, or suspend" only an *order* of the Interstate Commerce Commission.

Having no jurisdiction of the cause, it (a three judge court) cannot even determine whether an equitable cause of action is stated which may entitle the plaintiff to relief in the United States District Court for the Northern District of Indiana, South Bend Division. Such question is for the District Judge of that court to determine.

For the reasons stated this three judge statutory court must decline to take jurisdiction of the cause or grant the relief sought.

Slick, dissenting, in a separate memorandum.

Upon the filing of this memorandum the parties are directed to present a proper order and special findings of fact and conclusions of law.

SLICK, *Judge* (dissenting):

The matter involved in this controversy appears so important to me that, notwithstanding the great respect I have for the majority opinion filed by my worthy Associate Judges, I am constrained to briefly express my views in this dissenting opinion.

In United States et al. *v.* Los Angeles and Salt Lake Railroad Company, 273 U. S. 299, relied upon by defendants, the Supreme Court seems to fix a rule for determining the question of jurisdiction of a three judge court, depending upon whether the Interstate Commerce Commission in making its finding was exercising a quasi-judicial function to determine controversies.

In this case the Interstate Commerce Commission functioned in a quasi-judicial manner. The Railway Labor Act puts certain duties and obligations upon carriers, and in defining "carriers", the act provides that there shall not be included any street, interurban or suburban electric railway, unless such railway operates as part of a general steam railway system. The act authorizes and directs the Interstate Commerce Commission upon request of the Mediation Board to "determine after hearing whether any line operated by electric power falls within the terms of this proviso." The Mediation Board made such a request and this was in the nature, under the statute, of a suit. Notice was required and given. A hearing was had. Evidence was taken. Arguments were made and briefs filed. Then followed a final determination or order as follows: "We find that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act as amended June 21, 1934, and it is therefore subject to the provisions of that act."

In United States et al. *v.* Los Angeles and Salt Lake Railroad Company, *supra,* which involved an appraisal of property only, the court in deciding that the case was not triable by a three judge court, said that the so called order did not "grant or withhold any privilege or license"; that the finding did not "extend or abridge any power or facility"; that the order did not "subject the carrier to any liability, civil or criminal"; that the finding did not "change the carrier's existing or future status or condition."

The finding or order in this case does withhold a privilege; that accorded electric interurbans to exemption from the operation of the Railway Labor Act. It does abridge the rights and powers of the Chicago South Shore and

South Bend Railroad. It subjects the company to civil, possibly criminal, liability, and is so treated by the Mediation Board in demanding a compliance with the order. It changes the company's existing and future status from an electric interurban to a carrier, as defined under the Railway Labor Act, and determines the company's status and fastens upon it an obligation. It was in effect and for the purpose of the hearing, an order fixing and determining the status of the company and deciding that the company is "subject to the provisions of the act."

The act of Congress giving this court jurisdiction does not define or limit the nature of an order to render it reviewable. The order here is the final determination and finding that the South Shore is a carrier, and that it is therefore subject to the provisions of the Railway Labor Act.

The proceeding before the Interstate Commerce Commission was an adversary one, contested, tried, and decided like any other suit. It was a quasi-judicial proceeding fixing the status of the South Shore, fastening upon it certain obligations, rendering it subject to certain civil liabilities. What more could a final order do?

I cannot avoid the conclusion that here was an order within the intent and purpose of Congress, and that this three judge court has jurisdiction. "We find" that the company is not an electric interurban and "that it is subject to the provisions of the Railway Labor Act". How much stronger would it have been had the Interstate Commerce Commission preceded its final decree by the formal words usually found in a court order "it is therefore ordered"? The real meaning of the Commission's finding is that the plaintiff is not an electric railway, and that it comes under the provisions of the Railway Labor Act, and that it shall be governed accordingly and submit to the regulations of the Mediation Board.

If this is not an order affecting the existing and future status of the Chicago South Shore and South Bend Railroad, it is hard to understand what it really is. Equity does not regard form and should not regard technicalities.

It looks through the form to discover the merits. The real merits of this controversy are whether or not the Chicago South Shore and South Bend Railroad is to be governed as a carrier and compelled to comply with all the requirements of the state and federal acts applicable to carriers, or whether it is in truth and in fact an electric interurban or suburban railway.

In my opinion the Interstate Commerce Commission was acting as a quasi-judicial body in making this ruling and order, and that therefore this court has jurisdiction.

FILE COPY

Office - Supreme Court, U. S

JAN 13 1938

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1937

No. 502

JOHN N. SHANNAHAN and CLAUDE J. JACKSON, as Trustees of the Property of Chicago South Shore and South Bend Railroad, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Brief for Appellants.

John C. Lawyer,
R. Stanley Anderson,
Counsel for Appellants.

CHICAGO LAW PRINTING CO., 111 N. WACKER DRIVE (COR. WASHINGTON ST.) TEL. FRANKLIN [illegible]

SUBJECT INDEX.

PAGE

Appeal from final decree 1

The petition 2

Answer of the United States 3

Intervention by Commission 3

Hearing 3

Special findings of fact and conclusions of law 4

Final decree 5

Opinion below 6

Jurisdiction of the court 6

Statement of the case 6

The South Shore is an interurban 8

Specifications of errors urged 14

Points and Authorities:

1. The three judge statutory court had jurisdiction 15
2. The South Shore is an interurban 26

Argument:

1. The three judge statutory court had jurisdiction 31
2. The South Shore is an interurban 39

Conclusion 49

Appendix 51

PAGE

TABLE OF CASES.

Alton Railroad Co. v. United States, 287 U. S. 229; 77 L. ed. 275 .... 18, 19, 26, 33

Atlanta, Birmingham & Coast Ry. Co. v. United States, 296 U. S. 33; 80 L. ed. 25 23

Baltimore & Ohio Railroad Co. v. United States, 264 U. S. 258; 68 L. ed. 667 .... 19, 21, 22, 26, 31

Brady v. Interstate Commerce Commission, 43 Fed. (2d) 847; affirmed 283 U. S. 804 23

Brooklyn Eastern District Terminal v. United States, 28 Fed. (2d) 634 15

Chicago & Calumet Terminal Railway Co. v. Whiting, Hammond and East Chicago Street Railway Co., 139 Ind. 297; 38 N. E. 604; 26 L. R. A. 337; 47 Am. St. Rep. 264 .... 28, 45

Chicago Lake Shore and South Bend Ry Co. v. Guilfoyle, 198 Ind. 9; 152 N. E. 167; 46 A. L. R. 1465 .... 13, 29, 44, 45

Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382; 76 L. ed. 808 15

Colorado v. United States, 271 U. S. 153; 70 L. ed. 878 18

Delaware & Hudson Co. v. United States, 266 U. S. 438; 69 L. ed. 369 .... 19, 23

Denver & Interurban R. Co. v. United States, 150 C. C. A. 17; 236 Fed. 685 .... 28, 46

Florida East Coast Ry. Co. v. United States, 234 U. S. 167; 58 L. ed. 1267 21

Great Northern Ry. Co. v. United States, 277 U. S. 172; 72 L. ed. 838 .... 23, 25, 33

Interstate Commerce Commission v. Louisville & Nashville Railroad Co., 227 U. S. 88; 57 L. ed. 431 .... 20, 48

Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541; 56 L. ed. 308 20

Kansas City Western R. Co. v. McAdow, 240 U. S. 51 .... 28, 46, 47

PAGE

TABLE OF CASES.

Kinsey v. Union Traction Co., 169 Ind. 576; 81 N. E. 922 ....29, 45
Lehigh Valley Railroad Company v. United States, 243 U. S. 412; 61 L. ed. 819 23
Minneapolis & St. L. R. Co. v. Peoria & P. U. R. Co., 270 U. S. 58; 70 L. ed. 743 23
Mordhurst v. Ft. Wayne & S. W. Traction Co., 163 Ind. 268; 71 N. E. 642 ....29, 45
Nashville, Chattanooga & St. Louis R. Co. v. Wallace, 288 U. S. 249; 77 L. ed. 730 ....20, 34, 35
Northern Pacific R. R. Co. v. Dept. of Public Works of Washington, 268 U. S. 39; 69 L. ed. 836 ....22, 48
Omaha & Council Bluffs Street Ry. Co. v. Interstate Commerce Commission, 230 U. S. 324; 57 L. ed. 1501 ....27, 45
Piedmont & Northern Ry. Co. v. Interstate Commerce Commission, 286 U. S. 299; 76 L. ed. 1115 ....27, 30, 41, 48
Piedmont & Northern Railway Co. v. United States, 280 U. S. 469; 74 L. ed. 551; 30 Fed. (2d) 421..19, 24, 27, 30
Pittsburgh & West Virginia Ry. Co. v. United States, 281 U. S. 479; 74 L. ed. 980 24
Powell v. United States, 300 U. S. 276; 81 L. ed. 423 ....18, 20
Proctor & Gamble Co. v. United States, 225 U. S. 282; 56 L. ed. 1091 ....22, 24, 33
Skinner & Eddy Corp. v. United States, 249 U. S. 557; 63 L. ed. 772 ....21, 48
Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497......28, 46
Texas & New Orleans R. R. Co. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548; 74 L. ed. 1034 26
United States v. Atlanta, Birmingham & Coast R. R. Co., 282 U. S. 522; 75 L. ed. 513 23
United States v. Baltimore & Ohio R. R. Co., 293 U. S. 454; 79 L. ed. 587 ....19, 26, 34

TABLE OF CASES.

United States v. Chicago North Shore and Milwaukee R. R. Co., 288 U. S. 1; 77 L. ed. 583 ..... 27, 39, 48
United States v. Erie R. R. Co., 236 U. S. 259; 59 L. ed. 567 48
United States v. Hubbard, 266 U. S. 474 ..... 28, 46, 47
United States v. Idaho, 298 U. S. 105; 80 L. ed. 1070 ..... 15, 18, 21
United States v. Illinois Central R. R. Co., 244 U. S. 82; 61 L. ed. 1007 23
United States v. Los Angeles & Salt Lake R. R. Co., 273 U. S. 299; 71 L. ed. 651 ..... 19, 22, 32
United States v. Louisiana & Pacific Ry. Co., 234 U. S. 1; 58 L. ed. 1185 20
United States v. New River Co., 265 U. S. 533; 68 L. ed. 1165 22
Venner v. Michigan Central R. R., 271 U. S. 127; 70 L. ed. 868 16
Village of Mantorville v. Chicago & Great Western R. R., 8 Fed. Supp. 791 16
Virginia Ry. Co. v. System Federation No. 40, etc. et al., 300 U. S. 515; 81 L. ed. 789 26

STATUTES CITED.

Judicial Code, Section 209; 28 U. S. C. A. Section 45 ..... 2, 15, 31
The Railway Labor Act, as amended June 21, 1934, 48 Statutes at Large 1185; 45 U. S. C. A. Section 151 ..... 2, 6, 17
Urgent Deficiencies Act, 38 Statutes at Large 208, 219; 28 U. S. C. A. Section 41 (28) 2, 15, 31
Urgent Deficiencies Act, 38 Statutes at Large 220; 28 U. S. C. A. Section 47 ..... 15, 31

PAGE

STATUTES CITED.

Statutes exempting interurbans:

An Act to Provide for the Incorporation of Street Railroad Companies, approved June 4, 1861, Paragraph 13279, et seq. Burns Annotated Indiana Statutes 1926 edition 13

Carriers Taxing Act, app. August 29, 1935, Section 11 17

Eminent Domain, Paragraph 55-3601 Burns Indiana Statutes Annotated, 1933 edition (Rec. 45)........12-13

Federal Control Act passed during the World War, 40 St. L. 451 17

Hauling freight over interurban tracks, Paragraph 55-3602 Burns Indiana Statutes Annotated 1933 edition 12, 29

Indeterminate Permits, Paragraph 54-605 Burns Indiana Statutes Annotated, 1933 edition (Rec. 42) 9

Indiana General Corporation Act, Paragraphs 25-101 et seq. and 25-245 et seq. Burns Indiana Statutes Annotated, 1933 edition (Rec. 40, 41) 8

Judicial Code, Sections 208 and 211; 28 U. S. C. A. Sections 46 and 48 16

Paragraph 22 of Section 1 of the Interstate Commerce Act relating to extensions and abandonment of facilities. 49 U. S. C. A. Section 1 (22) 17, 28, 46

Section 15(a) of the Interstate Commerce Act relating to fair return for carriers. 49 U. S. C. A. Section 15(a) 17

Section 20(a) of the Interstate Commerce Act relating to securities. 49 U. S. C. A. Section 20(a) 17, 39

Section 204 of the Transportation Act of 1920, 49 U. S. C. A. Section 73 (a) 17

Section 209 of the Transportation Act of 1920, 49 U. S. C. A. Section 77(a) 17

The Boiler Inspection Act, 45 U. S. C. A. 22 ....17, 34

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937

No. 502

JOHN N. SHANNAHAN AND CLAUDE J. JACKSON, AS
TRUSTEES OF THE PROPERTY OF CHICAGO SOUTH SHORE AND
SOUTH BEND RAILROAD, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Brief for Appellants.

Appeal From Final Decree.

This is an appeal from a decree entered September 17, 1937 (R. 29) by the District Court of the United States for the Northern District of Indiana, South Bend Division, dismissing the suit for want of jurisdiction, one judge dissenting. The petition for appeal, with the assignments of error, was presented and allowed September 17, 1937 (R. 30 to 34).

The Petition.

June 22, 1936, appellants filed their petition (R. 1 to 6) pursuant to Section 209 of the Judicial Code (Title 28 U. S. C. A. Sec. 45), invoking the jurisdiction of the court under the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large, 208, 219 (28 U. S. C. A. Sec. 41, Subdiv. 28) to set aside, annul and suspend the order, finding and determination of the Interstate Commerce Commission made February 14, 1936 (214 I. C. C. 167 to 173) in a proceeding under Section 1 of the Railway Labor Act, as amended June 21, 1934, Chapter 691, Section 1, 48 Statutes at Large, 1185 (Title 45 U. S. C. A. Sec. 151) determining:

> "That the line of the Chicago South Shore and South Bend Railroad is not a street, interurban or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is, therefore, subject to the provisions of that act."

The petition alleges that the Commission in making and issuing said order, finding and determination, erred as a matter of law in the following particulars, to-wit:

(a) Said order, finding and determination is contrary to the indisputable character of the evidence;

(b) The facts found by said Commission do not, as a matter of law, support the order, finding and determination of the Commission;

(c) Said order, finding and determination is unsupported by the evidence, is without supporting evidence and is arbitrary; and

(d) The line of the Chicago South Shore and South Bend Railroad is an interurban electric railway within the exemption proviso of the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and is not operated as a part of a general steam railroad system of transportation (R. 4).

The petition prays that the order, finding and determination of the Commission be set aside, annulled and suspended and that the enforcement of said order, finding and determination be enjoined (R. 5).

Answer of the United States.

July 6, 1937, the United States filed its answer (R. 7 to 9) claiming that:

(a) The court was without jurisdiction because the alleged order of the Commission complained of was not an order within the meaning of the Urgent Deficiencies Act; and

(b) Denying the allegations of the petition.

Intervention by Commission.

August 17, 1936, the Interstate Commerce Commission intervened and filed its answer (R. 9 to 12):

(a) Denying the allegations of the petition; and

(b) Claiming the determination and report of the Commission was not an order within the meaning of the Urgent Deficiencies Act and for that reason the court was without jurisdiction.

Hearing.

A special three-judge statutory court was convened pursuant to the provisions of the Urgent Deficiencies Act (R. 22). May 18, 1937, the court heard the evidence and arguments of counsel and took the case under advisement (R. 22). On August 16, 1937, an opinion (R. 22 to 24) and dissenting opinion (R. 24 to 27) were filed, the majority opinion holding that the three-judge statutory court must decline to take jurisdiction because the determination of the Commission was not an order.

Special Findings of Fact and Conclusions of Law.

September 17, 1937, special findings of fact and conclusions of law were made and entered by the court (R. 27 to 28). The findings and conclusions, omitting formal parts, are as follows:

> "FINDINGS OF FACT.
>
> "1. That on or about May 17, 1935, pursuant to request made of it by the National Mediation Board, the Interstate Commerce Commission instituted a proceeding entitled Railway Labor Act Docket No. 8, *Chicago, South Shore and South Bend Railroad,* wherein it undertook to determine whether said railroad was a street interurban or suburban electric railway such as falls within the exemption proviso of Section 1 of the Railway Labor Act, excluding from the force and effect thereof carriers of classes in said section described. That after due notice to all parties and a hearing, in which the Commission heard all the evidence offered by parties interested in said proceeding, the Commission issued a report, which appears as Exhibit A to its answer and is officially reported 214 I. C. C. 167. That in said report the Commission found and determined that said railroad is not a street interurban or suburban electric railway within the term of said exemption proviso and that it is, therefore, subject to the provisions of said Railway Labor Act.

"2. That the petition denominates and describes the Commission's said report, finding and determination as an 'order,' as said term is used in the Urgent Deficiencies Act of October 22, 1913, above referred to, and prays that said finding and determination be set aside, annulled and suspended and that the enforcement thereof be enjoined. Said petition further invokes the jurisdiction of a statutory three-judge court as provided for in said Urgent Deficiencies Act, pursuant to which this court has been convened.

"3. That the answers of both defendants deny that said report, finding and determination of the Commission constitute an order as to which a three-judge court has power or jurisdiction under the statute to enjoin, set aside, annul or suspend, and moved that this statutory court dismiss said petition for lack of jurisdiction.

"CONCLUSIONS OF LAW.

"1. The report, finding and determination of the Commission, with respect to the petitioners' railroad, made pursuant to the provisions of the Railway Labor Act, as referred to in the above findings of fact, is not an order of the Commission which, under the terms of the Urgent Deficiencies Act, this statutory court has jurisdiction to enjoin, set aside, annul or suspend.

"2. Since this court has no jurisdiction over the subject matter of the petitioners' petition, this suit should be dismissed by this court for lack of jurisdiction."

Final Decree.

An order was entered by the court on September 17, 1937, dismissing the suit for want of jurisdiction (R. 29).

Opinion Below.

The opinion of the three-judge statutory court appears in the printed record in this case (R. 22 to 27). The opinion has been reported in *Shannahan et al.* v. *United States*, 20 Fed. Supp. 1002 (advance sheets).

Jurisdiction of the Court.

Paragraph 1 of Rule 12 of this court has been complied with.

Statement of the Case.

On August 9, 1934, the National Mediation Board, pursuant to Section 1, First, of the Railway Labor Act, as amended June 21, 1934, 48 Statutes at Large, 1185 (45 U. S. C. A. Sec. 151) requested the Interstate Commerce Commission to determine whether the lines of railroad operated by Chicago South Shore and South Bend Railroad, herein called "South Shore," fall within the terms of the proviso of the first paragraph of said Section 1, which proviso exempts from the terms of the Act any street, interurban or suburban electric railway unless such railway is operating as a part of a general steam railroad system of transportation (R. 39).

On May 17, 1935, the Interstate Commerce Commission, pursuant to said request of the National Mediation Board, gave notice to the South Shore that the matter of determining the status of the South Shore under the proviso of the first paragraph of Section 1 of the Railway Labor Act had been assigned for hearing at the Hotel Morrison, Chicago, Illinois, June 29, 1935 (R. 39). At that time and place the South Shore appeared and introduced evidence, oral and documentary, in support of its claim that it was an interurban railway and exempt from the Railway Labor

Act. On August 9, 1935, the South Shore filed its brief with the Commission and the case was argued orally before the Commission on November 19, 1935. On December 30, 1935, John N. Shannahan and Claude J. Jackson, as Trustees of the property of the South Shore, filed their written appearance in the proceedings.

On February 14, 1936 (R. 56), the Interstate Commerce Commission filed its report (214 I. C. C. 167, 173) (R. 13 to 22). The report recites the proceedings and summarizes the evidence, concluding by determining that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban or suburban electric railway.

A printed copy of the report is attached to the answer of the Commission (R. 13 to 22).

On April 11, 1936, the South Shore filed its petition for rehearing and on May 11, 1936, the Commission by a formal order denied the petition for rehearing, using the following language:

> "It is ordered, that said petition be, and it is hereby, denied" (R. 56, 57).

At the hearing before the statutory court on May 18, 1937, the appellants introduced in evidence a complete transcript of all the testimony and proceedings before the Interstate Commerce Commission (R. 38 to 57).

The majority of the court declined to consider the case on the merits and filed an opinion holding that the statutory court was without jurisdiction because the determination by the Commission did not constitute an order (R. 22 to 24). One judge dissented, holding that the determination constituted an order and that the court had jurisdiction (R. 24 to 27).

Special findings of fact were entered (R. 27 to 28) and the court's conclusions of law were stated (R. 28), in which the majority held that the report of the Commission did not constitute an order and the court was without jurisdiction. This was followed on September 17, 1937, by the final order dismissing the suit for want of jurisdiction (R. 29).

The South Shore is an Interurban.

The South Shore was incorporated in 1925 under an Act of the State of Indiana entitled "An Act to Provide for the Incorporation of Street Railroad Companies," approved June 4, 1861, and the various acts amendatory thereof and supplementary thereto (R. 39). Its Articles of Association were filed with the Secretary of State of Indiana and recorded in the recorder's office of LaPorte County, Indiana, on June 23, 1925. The objects and purposes of the South Shore as stated in its Articles of Association are to maintain and operate, construct, purchase, lease, or otherwise acquire, own and control street railroad, interurban street railroad and suburban street railroad lines and systems (R. 40).

On July 10, 1925, the South Shore was admitted to do business in Illinois as a street, interurban and suburban railroad. It accepted the provisions of the Indiana General Corporation Act by executing its Articles of Reorganization and filing them with the Secretary of State of Indiana on September 18, 1929. Its Articles of Reorganization, like the original Articles, authorize the operation of street, interurban and suburban lines (R. 40, 41).

The first paragraph of Section 1 of the Railway Labor Act defines the term "carrier" as including among others any carrier by railroad subject to the Interstate Commerce Act, which is followed by a proviso excluding interurbans, unless such railway is operating as a part of a general steam-railroad system of transportation. The South Shore is operated with electric power, and none of its capital stock is owned by any steam railroad. It is not operated as a part of a general steam-railroad system of transportation (R. 43). The only issue before the Commission was whether it was an interurban as that term is used in the proviso.

The South Shore operates an electric railroad between Chicago, Illinois, and South Bend, Indiana, 89.78 miles (R. 44). Approximately 6.39 miles of its line between the Indiana-Illinois State Line and Kensington, Illinois, is leased from the Kensington & Eastern Railroad Company, a subsidiary of the Illinois Central Railroad Company, and the South Shore has trackage rights over the Illinois Central's electrified suburban line between Kensington and Randolph Street in Chicago, 14.2 miles. That portion of the line in Indiana amounting to about 69 miles was constructed between 1907 and 1909 by the Chicago, Lake Shore and South Bend Railroad Company, herein called the "Lake Shore," and was acquired by the South Shore at a foreclosure sale in 1925 (R. 41). Both the South Shore and its predecessor were incorporated in Indiana under an act for the incorporation of street-railroad companies, and the Articles of Incorporation of both have at all times authorized the operation of street, interurban, or suburban lines (R. 39, 41). The original franchises to use the streets in various cities and towns for a street and interurban railway were surrendered in 1922 for an indeterminate permit under the Public Service Commission Law of Indiana (R. 42).

The tracks are of standard gage, generally with 100-pound rails, but some weigh from 70 to 130 pounds per yard (R. 45). Approximately 20.26 miles of the line is double track, and the balance is single track. Approximately 5.98 miles or 6.6 percent of the line is on public streets, and the balance is on private right of way. The line of the Illinois Central Railroad used into Chicago is elevated. The maximum grade is 2.5 percent, but the ruling grade is level, and the maximum curvature is 10°. The roadbed is generally ballasted with gravel, and compares favorably with some of the steam railroads in the same vicinity, but is not equal to those of the large trunk lines. A block-signal system is used, together with interlocking-signal devices at crossings with several other railroads. There are no cattle guards along the line.

The South Shore operates 32 passenger trains each way daily over all or portions of its line, most of which consist of one or two coaches (R. 46, 47). The maximum number of coaches per train is ordinarily 5 or 6, although occasionally as many as 10 coaches are handled on excursion trains, and in one instance 20 coaches were handled with a locomotive. The South Shore has 62 passenger cars, of which 49 are motor cars and the balance trailers. Their seating capacity ranges from 44 to 56 passengers compared with from 76 to 98 in steam-railroad cars. This carrier also has two dining cars and four parlor cars, which are not now in use. Ten of the passenger cars have baggage compartments, and baggage and express are carried. Passenger stations and agents are maintained by the South Shore at eight points, and it uses six Illinois Central passenger stations at various places in Chicago. Stops are also made on signal at highway crossings in the country between regular stations. The local passenger fares of the South Shore are on the basis of 3.6 cents per mile, which generally applies on the steam railroads in this territory. No interline tickets are sold except in connection with the Illinois Central and the Chicago, Indianapolis & Louisville Railway, which represents less than one half of 1 percent of the South Shore's passenger business.

This line had no freight business prior to 1916 (R. 50). Since then, its freight revenue has gradually increased from $4,807 in that year to a maximum of $1,596,246 in 1930. During each of the last four years preceding the hearing, 1931 to 1934, inclusive, its freight revenue exceeded its passenger revenue. The freight traffic is of a mixed character. No livestock is handled (R. 51, 52). Over 90 percent of the freight handled by the South Shore is interchanged with other railroads and moves in interstate commerce. The commodity handled in largest volume is coal, which is received from lines on the east and delivered to other lines on the west. The South Shore is also an intermediate carrier with respect to grain moving east. It is a party to a large number of tariffs publishing joint rates to and from points throughout the country (R. 50). The South Shore maintains a traffic organization at Chicago and other points on its line, and it also has off-line solicitors at Minneapolis, Minnesota, Kansas City, Missouri, Seattle, Washington and in Wisconsin.

This carrier has 14 electric locomotives, with a rating of 4,000 tons each, which are used for hauling its freight trains (R. 48). These generally consist of from 40 to 55 cars, although 60 to 70 cars have been handled occasionally, and one instance is referred to of an 87-car train. The South Shore has only 16 revenue-freight cars, and the bulk of its freight is handled in foreign-line equipment. This is repaired when necessary in the South Shore's shops under rules of the American Railway Association, an average of about 100 cars per month being so repaired. Direct connections for the interchange of carload freight are maintained with seven trunk lines and six belt or switching lines which serve the Chicago district. The number of carloads of freight interchanged with these connections in recent years has ranged from 29,674 to 58,790 per year. Practically the only freight which is not interchanged is a small amount of less-than-carload traffic. Formerly the South Shore had a large amount of less-than-carload business, but this has largely been lost to the trucks. The South Shore has 25 passenger crews and 5 freight crews. Its employes averaged 832 in 1928 and 463 in 1934.

The South Shore was not under Federal control during the World War emergency period (R. 51). Although its freight revenues have slightly exceeded its passenger revenues during the years 1931, 1932, 1933 and 1934, the passenger revenues of the Class I steam railroads averaged only 10.6 percent of their total revenues in 1933 and were only 20.8 percent in 1920, when passenger revenues apparently reached their peak (R. 51).

The evidence introduced by Appellants before the Commission establishes without contradiction the following facts:

(1) The South Shore is incorporated under the laws of the State of Indiana as an interurban railroad (R. 40).

(2) The laws of Indiana authorize the South Shore as an interurban railroad to carry freight (R. 49, 50).
    Sec. 55-3602 Burns Indiana Statutes Annotated
        1933 ed.

(3) The South Shore is admitted as a foreign corporation to do business as an interurban railroad in Illinois and to carry passengers and property (R. 40).

(4) The laws of Indiana give the South Shore as an interurban railroad the right to condemn and take

property for right of way and railroad purposes by eminent domain, Paragraph 55-3601 Burns Indiana Statutes Annotated 1933 edition (R. 45).

Pars. 13274 and 13279 Burns Annotated Indiana Statutes 1926 ed.

Par. 3-1713 Burns Indiana Statutes Annotated 1933 ed.

(5) The percentage of operating revenues derived by the South Shore from the transportation of freight was greatest in 1932 when the revenue from freight was 51.45 percent of the total operating revenues of the South Shore. Before and since 1932 the percentage has been less. The percentage of operating revenues derived from the transportation of freight by all Class I railroads in the United States in 1933 was approximately 89 percent (R. 51).

(6) For 7 years from 1909 to 1915 no freight was carried over the railroad now operated by the South Shore (R. 50).

(7) The South Shore was not under Federal control during the World War or subsequent thereto (R. 51).

(8) The South Shore is restricted by the provisions in a deed covering 6 miles of its right of way in Gary from carrying live stock over said six miles of right of way (R. 51, 52).

(9) The Supreme Court of Indiana in *Chicago Lake Shore and South Bend Railway Company* v. *Guilfoyle,* 198 Ind. 9, held that the property now owned by the South Shore was an interurban railroad property and it was proper to haul freight over the tracks in the streets of South Bend, Indiana (R. 42).

(10) The tracks of the interurban are not an additional servitude when constructed in the public streets and therefore interurbans are classed with street railways and not with steam railroads under the laws of Indiana (R. 42).

(11) The South Shore operates exclusively with electric power. It operates 64 passenger trains daily. It has 25 passenger crews and 5 freight crews (R. 52).

(12) The South Shore is not operated as a part of a general steam railroad system of transportation (R. 43).

Specification of Errors Urged.

Appellants urge all the errors assigned (R. 33 to 34).

The determination by the Commission was an order and the conclusion of the court that it was not an order is erroneous. The statutory court had jurisdiction of the suit and erred in dismissing it.

POINTS AND AUTHORITIES.

I.

The Three-Judge Statutory Court Had Jurisdiction.

(1) *Statutes Concerning Jurisdiction.*

The District Court shall have original jurisdiction as follows:

> "* * *
>
> "Twenty-eighth. Of cases brought to enjoin, *set aside, annul, or suspend,* in whole or in part any order of the Interstate Commerce Commission.
>
> "* * *"

38 Statutes at Large, 219; 28 U. S. C. A. Sec. 41 (28).

Sec. 209 Judicial Code; 28 U. S. C. A. Sec. 45.

A three-judge statutory court is required.

38 Statutes at Large, 220; 28 U. S. C. A. Sec. 47.

United States v. *Idaho,* 298 U. S. 105, 110; 80 L. ed. 1070, 1074-5.

Claiborne-Annapolis Ferry Co. v. *United States,* 285 U. S. 382, 390-91; 76 L. ed. 808, 814.

Brooklyn Eastern District Terminal v. *United States,* 28 Fed. (2d) 634, 635.

(2) *Order Not Subject To Collateral Attack.*

An order of the Interstate Commerce Commission is not subject to collateral attack and a suit to set it aside must be brought against the United States.

> Sec. 208 and 211 Judicial Code; 28 U. S. C. A. Sec. 46 and 48.
>
> *Venner* v. *Michigan Central Railroad,* 271 U. S. 127, 130-131; 70 L. ed. 868, 869, 870.
>
> *Village of Mantorville* v. *Chicago & Great Western Railroad,* 8 Fed. Supp. 791, 795-797.

(3) *The Railway Labor Act.*

The first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, reads as follows:

> "First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided,* however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Com-

> mission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to *determine*, after hearing *whether any line operated by electric power falls within the terms of this proviso.*"
>
> 48 Statutes at Large, 1185; 45 U. S. C. A. Sec. 151.

The language of the statute requires a determination. The Commission cannot decline jurisdiction and the statute clothes the determination with the status of an order. The Commission cannot by any device avoid these consequences.

In addition to the Railway Labor Act, the following federal statutes exempt street, interurban or suburban electric railways from compliance with their requirements:

> Paragraph 22 of Section 1 of the Interstate Commerce Act relating to extensions and abandonment of facilities. 49 U. S. C. A. Sec. 1 (22).
>
> Section 15(a) of the Interstate Commerce Act relating to fair return for carriers. 49 U. S. C. A. Sec. 15(a).
>
> Section 20(a) of the Interstate Commerce Act relating to securities. 49 U. S. C. A. Sec. 20(a).
>
> Federal Control Act passed during the World War, 40 St. L. 451.
>
> Section 204 of the Transportation Act of 1920, 49 U. S. C. A. Sec. 73(a).
>
> Section 209 of the Transportation Act of 1920, 49 U. S. C. A. Sec. 77(a).
>
> The Boiler Inspection Act, 45 U. S. C. A. 22.
>
> Carriers Taxing Act, approved August 29, 1935, Sec. 11.

(4) *Substance Not Form Controls.*

The jurisdiction of courts to review orders of the Commission is not dependent upon the form in which the order is couched.

> *Alton Railroad Co.* v. *United States,* 287 U. S. 229, 237; 77 L. ed. 275, 281.

A certificate of convenience and necessity permitting the abandonment of a railway, so far as it permits abandonment, is not in form an order. But the courts look to the substance and take jurisdiction of a suit to enjoin enforcement on the ground that the certificate is an order.

> *United States* v. *Idaho,* 298 U. S. 105, 110; 80 L. ed. 1070, 1075.
>
> *Colorado* v. *United States,* 271 U. S. 153, 159-170; 70 L. ed. 878, 881-886.

Over-emphasis upon the mere form of the order may not be permitted to obscure its purpose and effect.

> *Powell* v. *United States,* 300 U. S. 276, 284, 285; 81 L. ed. 423, 427. (Adv. sheets)

(5) *The Commission's Action Was Quasi Judicial and Reviewable.*

The proviso of the first paragraph of the Railway Labor Act authorizes the Interstate Commerce Commission upon request of the Mediation Board or upon complaint of a party interested *"to determine after hearing"* whether any line operated by electric power falls within the terms of the proviso.

Quasi judicial action is thereby prescribed.

The Commission can make the *determination* only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action. An order unsupported by evidence is void.

Baltimore & Ohio Railroad Co. v. *United States*, 264 U. S. 258, 264-265; 68 L. ed. 667, 673, 674.

The Commission was not at liberty to decline to exercise its jurisdiction. The Railway Labor Act imposes upon it the obligation to make the determination. The determination was made by the Commission within the scope of its duty to regulate interstate commerce.

Alton Railroad Co. v. *United States*, 287 U. S. 229, 236; 77 L. ed. 275, 281.

United States v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454, 458 to 462.

Where the quasi judicial function is exercised the order is reviewable.

United States v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299, 309; 71 L. ed. 651, 655.

The determination by the Commission fixes the *status* of the South Shore. By the determination the carrier is not an interurban within the exemption proviso of the first paragraph of Section 1 of the Railway Labor Act, and the obligations of that act are thereby fixed upon the carrier. Such determination is in substance a reviewable order.

United States v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299, 309-310; 71 L. ed. 651, 655.

Piedmont & Northern Ry. Co. v. *United States*, 280 U. S. 469, 477; 74 L. ed. 551, 555.

Baltimore & Ohio Railroad Co. v. *United States*, 264 U. S. 258, 263; 68 L. ed. 667, 673.

Delaware & Hudson Co. v. *United States*, 266 U. S. 438, 448; 69 L. ed. 369, 371-2.

While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function.

> *Nashville, Chattanooga & St. Louis R. Co.* v. *Wallace*, 288 U. S. 249, 259-64; 77 L. ed. 730, 733-736.
>
> *Powell* v. *United States*, 300 U. S. 276, 284, 285; 81 L. ed. 423, 427. (Adv. sheets)

(6) *The Legal Effect of Evidence Is a Question of Law.*

Administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence; or if the facts found do not as a matter of law support the order made.

Whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law—are all matters within the scope of judicial power.

> *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 91 and 92; 57 L. ed. 431, 433.
>
> *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, 547 and 548; 56 L. ed. 308, 311.

In the tap line cases it was held that the determination on undisputed facts of the question whether a line of railroad is a plant facility or a common carrier, is a conclusion of law subject to judicial review.

> ***United States* v. *Louisiana & Pacific Ry. Co.* (the tap line cases) 234 U. S. 1, 22; 58 L. ed. 1185, 1193.**

Where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact but one of law which is the duty of the courts to examine and decide.

> *Florida East Coast Ry. Co.* v. *United States*, 234 U. S. 167, 185 and 186; 58 L. ed. 1267, 1271 and 1272.
>
> *Baltimore & Ohio Railroad Co.* v. *United States*, 264 U. S. 258, 262-266; 68 L. ed. 667, 673-674.

Whether certain trackage is a "spur" is a mixed question of fact and law for the decision of the court in reviewing the Commissioner's order.

> *United States* v. *Idaho*, 298 U. S. 105, 107-110; 80 L. ed. 1070, 1073-1075.

To refuse to consider evidence introduced, or to make an essential finding without supporting evidence is arbitrary action.

> *Baltimore & Ohio Railroad Company* v. *United States*, 264 U. S. 258, 265; 68 L. ed. 667, 674.

(7) *Order May Be Set Aside For Lack of Substantial Evidence.*

The findings of the Commission may be set aside for lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law.

> *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562; 63 L. ed. 772, 6.

An order based upon a finding made without evidence (*Chicago Junction Case—Baltimore & Ohio R. R. Co.* v. *United States*, 264 U. S. 258, 263; 68 L. ed. 667, 673), or upon a finding made upon evidence which clearly does not support it (*Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 7, 56 L. ed. 308, 311), is an arbitrary act against which courts afford relief.

> *Northern Pacific R. R. Co.* v. *Dept. of Public Works of Washington*, 268 U. S. 39, 44-45; 69 L. ed. 836, 841.

(8) *Orders Held Not Reviewable Are Distinguishable.*

When the affirmative relief sought is denied by the Commission, judicial review is refused on that ground. *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282, 56 L. ed. 1091. The taking of jurisdiction in such cases would involve the court in the exercise of the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied.

The mere fact that an order dismisses a complaint does not make it a negative order. The effect of such an order was held to leave in force the rule attacked in the complaint.

> *United States* v. *New River Co.*, 265 U. S. 533, 539-541; 68 L. ed. 1165, 1171-1172.
>
> *Baltimore & Ohio Railroad Company* v. *United States*, 264 U. S. 258, 264; 68 L. ed. 667, 673-674.

The Commission's functions are manifold in character.

In some matters its duty is merely to investigate and report facts.

> *United States* v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299, 310; 71 L. ed. 651, 655.

In others the determination was not within the scope of the Commission's duty to regulate commerce, but was in substance a suit against the government to recover money.

Great Northern Ry. Co. v. *United States*, 277 U. S. 172, 180, 2; 72 L. ed. 838, 841, 842.

In other cases its action has been held advisory (*Minneapolis & St. L. R. Co.* v. *Peoria & P. U. R. Co.*, 270 U. S. 580, 584, 585, 70 L. ed. 743, 745, 746) supervisory, directory.

United States v. *Atlanta, Birmingham & Coast R. R. Co.*, 282 U. S. 522, 527, 528; 75 L. ed. 513, 518.

Atlanta, Birmingham & Coast R. R. Co. v. *United States*, 296 U. S. 33; 80 L. ed. 25.

An order fixing a date of hearing before the Commission is not reviewable, as it has no characteristics of an order, affirmative or negative. It is a mere incident in the proceeding.

United States v. *Illinois Central Railroad Co.*, 244 U. S. 82, 89; 61 L. ed. 1007, 1010.

An order declaring the tentative value of the property of a railroad company is not reviewable, being an ex parte appraisement without probative effect.

Delaware & Hudson Company v. *United States*, 266 U. S. 438, 445-49; 69 L. ed. 369, 370-72.

The findings on which a reparations order is based are not reviewable.

Brady v. *Interstate Commerce Commission*, 43 Fed. (2d) 847; affirmed 283 U. S. 804.

In *Lehigh Valley Railroad Company* v. *United States*, 243 U. S. 412, 414, 61 L. ed. 819, the Commission dismissed the petition of the Railroad asking for a hearing as to whether the services of a steamboat line owned by it would be in violation of the Panama Canal Act (49 U. S. C. A. Sec. 5, par. 10, 11 and 12) and for an extension of time.

The order of the Commission was negative in substance as well as in form. The risk of penalties is imposed by the statute and not by the order. The relief sought having been denied, the case is like *Proctor & Gamble* v. *United States*, 225 U. S. 282.

In *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469, 476, 477, 74 L. ed. 551, the railroad applied for a certificate to make an extension under Paragraph 18 of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1 (18)). The railroad moved to dismiss its application for want of jurisdiction; the Commission overruled the motion, took jurisdiction and denied the application on its merits.

The order was therefore negative in substance as well as in form and infringed no right of the railroad. If, as the railroad contends, the Commission was without jurisdiction, the railroad is free to proceed with the construction as if the Commission had not acted. If the railroad is prosecuted for proceeding without a certificate, the risk arises from the statute and not from the order of the Commission. The affirmative relief sought having been denied the case is like *Proctor & Gamble* v. *United States*, 225 U. S. 282.

In *Pittsburgh & West Virginia Railway Co.* v. *United States*, 281 U. S. 479, 486 to 488, 74 L. ed. 980, 983, the railway had intervened in proceedings before the Commission. The intervenor was a connecting carrier and a minority stockholder of the Wheeling & Lake Erie Railway Company. The Supreme Court held that the appellant was not entitled to bring a suit under the Urgent Deficiencies

Act to set aside the order of the Commission, because its status as an intervenor before the Commission and as a connecting carrier and minority stockholder of the Wheeling & Lake Erie Railway Company does not entitle it to institute an independent suit to set aside the Commission's order.

In the South Shore case the determination by the Commission fixes the status of the South Shore and makes the carrier affirmatively subject to the obligations of the Railway Labor Act, and hence the determination and order of the Commission fixing the status fixes the obligations and the risk.

In the *Lehigh Valley* and *Piedmont* cases the orders of the Commission were negative and dismissed the petitions, denying the affirmative relief that was sought. In the *South Shore* case the relief sought by the petition was granted, that is, the status of the railroad was determined as prayed.

(9) *That the Determination and Order of the Commission was Made Under the Railway Labor Act does not Deprive the Court of Jurisdiction to Set it Aside.*

A three-judge statutory court has no jurisdiction to set aside a certificate of the Commission issued to the Secretary of the Treasury ascertaining and certifying the amount due a railroad on termination of Federal control because the subject matter is not within the scope of the Commission's duty to regulate commerce. Such suit is in substance, as well as in name, a suit against the government to recover money.

> ***Great Northern Ry. Co. v. United States*, 277 U. S. 172, 180-82; 72 L. ed. 838, 841-842.**

An order of the Interstate Commerce Commission under the Boiler Inspection Act, 43 Statutes at Large, 659, 45

U. S. C. A., Section 22, was set aside for lack of essential basic findings of fact.

> *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 458 and 462; 79 L. ed. 587, 591-2, 594-5.

The Railway Labor Act is a valid and constitutional regulation of the relations of rail carriers to their employes under the Interstate Commerce clause of the Constitution.

> *Virginian Ry. Co.* v. *System Federation No. 40, etc. et al.*, 300 U. S. 515, 553-559; 81 L. ed. 789, 802-806.
>
> *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 570; 74 L. ed. 1034, 1046.

(10) *Order and Decree Should be Reversed and Cause Remanded.*

The decree dismissing the bill for want of jurisdiction should be reversed and the cause remanded for further proceedings.

> *Alton Railroad Co.* v. *United States*, 287 U. S. 229, 235-240; 77 L. ed. 275, 277-283.
>
> *Baltimore & Ohio Railroad Company* v. *United States*, 264 U. S. 258, 260-266; 68 L. ed. 667, 671-674.

II.

The South Shore Is An Interurban.

Section 77(m) of the laws relating to bankruptcy provides that the term "railroad corporation" as used in Section 77 means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban or an interurban

electric railway which is not operated as a part of a general steam-railroad system of transportation or which does not derive more than 50 percent of its operating revenue from the transportation of freight in standard steam railroad freight equipment. This provision is an express recognition that an interurban may derive more than 50 percent of its operating revenue from the transportation of freight in standard steam railroad freight equipment and still maintain its status as an interurban.

The carrier's line of railroad is an interurban. The determination by the Commission is contrary to the indisputable character of the evidence, the facts found by the Commission do not as a matter of law support the order and determination of the Commission, the order and determination is unsupported by evidence, is arbitrary, and the only proper legal conclusion to be drawn from the facts proven is that the line of railroad of the carrier is an interurban.

> *United States* v. *Chicago North Shore & Milwaukee R. R. Co.*, 288 U. S. 1; 77 L. ed. 583.
>
> *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299, 305-311; 76 L. ed. 1115, 1120-23.
>
> *Piedmont & Northern Ry.* v. *United States*, 280 U. S. 469; 74 L. ed. 551.

A street railroad though engaged in interstate commerce is not a railroad under the Interstate Commerce Act.

> ***Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324; 57 L. ed. 1501.**

The provisions of the Interstate Commerce Act that "the provisions of this chapter shall apply to common carriers

engaged in (a) the transportation of passengers or property wholly by railroad" etc., (49 U. S. C. A. Sec. 1) was held to include any common carrier engaged in the transportation of passengers or property by railroad in interstate commerce and also applied to an interurban railroad.

United States v. *Hubbard,* 266 U. S. 474.

Similarly, the words "common carrier by railroad," contained in the Federal Employers' Liability Act, *Kansas City Western R. R. Co.* v. *McAdow,* 240 U. S. 51; in the *Safety Appliance Act, Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S. 497; and in the Hours of Service Act, *Denver & Interurban R. R. Co.* v. *United States,* 150 C. C. A. 17, 236 Fed. 685, were applied to interurban electric railroads.

United States v. *Hubbard,* 266 U. S. 474, 479.

In *United States* v. *Hubbard,* 266 U. S. 474 at pages 479 and 480, the opinion directs attention to five sections of the law (cited in note 7) excluding interurbans. The last section cited as excluding interurbans deals with the Labor Board.

Under the laws of Indiana it is well settled (a) that a steam railroad constructed in a public street or highway is an additional servitude, for which an abutting owner is entitled compensation, and (b) that a street railway is not an additional servitude when constructed in a public street or highway and an abutting owner is not entitled to any additional compensation.

***Chicago & Calumet Terminal Railway Company* v. *Whiting, Hammond & East Chicago Street Railway Company,* 139 Ind. 297; 38 N. E. 604, 605 and 606; 26 L. R. A. 337; 47 Am. St. Rep. 264.**

Three cases in Indiana gradually developed the law to where it is equally well settled that an interurban, when constructed in a public street or highway is not an additional servitude, and an abutting owner is not entitled to any additional compensation, but can only recover for negligent or unlawful operations upon proof of special damages.

> *Mordhurst* v. *Ft. Wayne & S. W. Traction Co.*, 163 Ind. 268; 71 N. E. 642.
>
> *Kinsey* v. *Union Traction Co.*, 169 Ind. 576; 81 N. E. 922, 936 to 947.
>
> *Chicago Lake Shore & South Bend Ry. Co.* v. *Guilfoyle*, 198 Ind. 9; 152 N. E. 167; 46 A. L. R. 1465.

These cases support the contention of the South Shore that, as an interurban it is not an additional servitude when constructed in the public streets and, therefore, it is to be classed with street railways and not with the steam railroads.

The acts of 1920 of Indiana, Chapter 6, Section 1, page 32, give all interurban railways the right to haul freight. This section appears in Volume 10, Burns Indiana Statutes, Annotated, 1933 Section 55-3602, and is as follows:

> "All interurban railway companies now or hereafter organized and operating or which may hereafter operate in this state, in addition to the rights, privileges and powers already given and granted by law to such companies, are hereby empowered to transport over their respective roads and over the tracks of all street and interurban railways over which they have traffic contracts, and over, across and along and upon all highways, streets and alleys and public places occupied by such roads and tracks, or which may, in the

> future, be occupied by them, all classes of freight, subject, however, to the rules and regulations of the public service commission of Indiana."

A carrier subject to the Interstate Commerce Act may issue passes to officers, agents and employes of carriers not subject to the Act.

United States v. *Erie R. R. Co.*, 236 U. S. 250, 267-272; 59 L. ed. 567, 571-3.

To prove that an interurban is operated "as a part of a general steam railroad system of transportation" it is necessary to show control of the interurban by a steam railroad for operating purposes. "There must be also unity of ownership or unity of management and control."

Piedmont & Northern Ry. Co. v. *United States*, 30 Fed. (2d) 421, 426.

Piedmont & Northern Ry. v. *Interstate Commerce Commission*, 286 U. S. 299; 76 L. ed. 1115.

ARGUMENT.

I.

The Three-Judge Statutory Court Had Jurisdiction.

The District Court is given original jurisdiction of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission. 38 Statutes at Large, 219; 28 U. S. C. A. Sec. 41 (28). The jurisdiction shall be invoked by filing in the office of the clerk of the court a written petition. Judicial Code Sec. 209; 28 U. S. C. A. Sec. 45. The statute requires the cause to be determined by three judges. 38 Statutes at Large, 220; 28 U. S. C. A. Sec. 47.

Two of the three judges were of the opinion that the determination by the Interstate Commerce Commission was not an order and that the court had no jurisdiction. It was "conceded that it is not the name which the Commission gives to its action or to the document which evidences its action that determines whether it is a finding, a report, or an order." Substance not form controls and the question is whether the "report of the Commission" determining the status of the South Shore is in substance an order.

The proviso of the first paragraph of the Railway Labor Act authorizes the Interstate Commerce Commission upon request of the Mediation Board or upon complaint of a party interested "to determine, after hearing" whether any line operated by electric power falls within the terms of the proviso. Quasi judicial action is thereby prescribed. In *Baltimore & Ohio R. R. Co.* v. *United States*, 264 U. S.

258, 264, 265, this court said, "Congress, by using the phrase 'whenever the Commission is of the opinion, after hearing' prescribed quasi judicial action." The Commission can make the determination only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. An order unsupported by evidence is void. *Baltimore & Ohio R. R. Co.* v. *United States, supra.* Where the quasi judicial function is exercised the order is reviewable. The determination of the Commission fixing the status of the South Shore was the exercise of a quasi judicial function and is reviewable. *United States* v. *Los Angeles & Salt Lake Ry. Co.*, 273 U. S. 299, 309.

The Railway Labor Act does not make the determination by the Commission of the status of the carrier conclusive. Failing to make this determination conclusive the order is subject to review.

If the determination remains open to collateral attack the *"determination"* by the Commission is tentative.

If reviewable directly, uniformity in the classification by the Interstate Commerce Commisison of electric carriers will be advanced.

The determination by the Commission fixes the status of the South Shore. By the determination the carrier is not an interurban within the exemption proviso of the first paragraph of Section 1 of the Railway Labor Act. The obligations of that act are thereby fixed upon the carrier. Such determination is in substance a reviewable order.

That the action is quasi judicial is stressed by the allegations in relation to request, notice, hearing, participation, evidence, findings, conclusions and determination, made in the answer of the Commission (R. 10, 11), and appears from the findings of fact made by the court (R. 27, 28).

The legal effect of the evidence submitted to the Commission is a question of law. The determination on undisputed facts of the question, whether the South Shore is an interurban is a conclusion of law, subject to judicial review.

The majority opinion relies on the rule established in *Proctor & Gamble Company* v. *United States*, 225 U. S. 282, and the subsequent authorities following it. In those cases affirmative relief sought being denied by the Commission, a judicial review was refused. The orders in such cases were purely negative orders and to review the order would have involved the court in the exercise of the administrative functions of granting the relief which the Commission had denied.

In determining the status of the South Shore the affirmative relief sought was not denied, but, on the contrary, the status of the carrier was determined. In fact, the Commission was not at liberty to decline to exercise its jurisdiction. The Railway Labor Act imposes upon the Commission the obligation to make the determination. *Alton Railroad Company* v. *United States*, 287 U. S. 229, 236.

In *Great Northern Railway Company* v. *United States*, 277 U. S. 172, 180, 182, the certificate of the Commission, issued to the Secretary of the Treasury, ascertaining and certifying the amount due a railroad on termination of federal control, was not given within the scope of the Commission's duty to regulate commerce and review was denied because the suit brought was in substance, as well as in name, a suit against the government to recover money instead of a suit to set aside an order of the Commission.

Orders of the Interstate Commerce Commission may be set aside although not made under the Interstate Commerce

Act. For example, an order of the Interstate Commerce Commission under the Boiler Inspection Act, 43 Statutes at Large, 659, 45 U. S. C. A. Sec. 22, was set aside for lack of essential basic findings of fact. *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454, 458 to 462.

The Commission in making the determination of the status of the South Shore under the Railway Labor Act was acting within the scope of its duty to regulate interstate commerce. *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 458, 462; *Virginian Ry. Co.* v. *System Federation No. 40, etc. et al.*, 300 U. S. 515, 553-559. The Railway Labor Act was sustained as a valid and constitutional regulation of the relation of the rail carriers to their employes under the interstate commerce clause of the constitution of the United States.

The Commission made its determination after hearing and by the determination fixed the carrier's status under the Railway Labor Act. The action was quasi judicial and is reviewable within the meaning of the authorities and a review cannot be defeated by the Commission calling its determination a report instead of an order.

It was argued below that the determination by the Commission that the South Shore is not an interurban is not an order because the determination is incapable of being enforced. This argument is without foundation. *Nashville, Chattanooga & St. Louis R. R. Co.* v. *Wallace,* 288 U. S. 249, 259 to 264.

Take a simple action of debt with judgment for the defendant. Such judgment is utterly incapable of being enforced by execution or otherwise but it does have legal force and effect as is evidenced by the fact that it may be pleaded as *res adjudicata,* but no execution can be taken upon such judgment and there is no method by which it can be enforced except by pleading. Moreover, the plaintiff can appeal from such a judgment for the defendant and contend that it is erroneous and should be set aside. The fact that the plaintiff can appeal demonstrates that such a finding for the defendant is a judgment and has legal force and effect even though no execution can be levied thereon for the simple reason that the plaintiff could not appeal from such a finding if it were not a judgment because courts, either original or appellate, do not deal with non-judicial or non-justiciable matters.

In proceedings to establish the heirs of a decedent, infancy, insanity, or other status, the determinations made are clearly judgments even though no execution or method of enforcing the same exists. Also proceedings to quiet title when founded upon adverse possession, a bill for the construction of a will, a bill by trustees to a court for instructions as to what action to take or perform, clearly have such a character though no execution will lie thereon, and yet they are all judgments and present a justiciable controversy to the court. A decree adjudicating a man a bankrupt, probating a will, naturalizing an applicant, establishing the legitimacy of a child or the existence of a marriage, or the terms and provisions of a lost will, note or other instrument, or a bill to perpetuate testimony, or for discovery, all have a decree, order or judgment entered thereon which must be respected as having legal force and binding effect, but there is clearly no means provided in the finding, order, judgment or decree to execute the same. The same holds true of a decree annulling a supposed marriage. Such a decree merely announces a conclusion of law which is binding, and which must be respected.

Some or all of the foregoing were pointed out in *Nashville, Chattanooga & St. Louis Railway* v. *Roy C. Wallace*, 288 U. S. 249; 77 L. ed. 730, 735 to 736. The court said (pp. 735-736):

> "While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function * * *. This court has often exerted its judicial power to adjudicate boundaries between states, although it gave no injunction or other relief beyond the determination of the legal rights which were the subject of controversy between the parties, * * * and to review judgments of the court of claims although no process issues against the government."

Subdivision 28 of Section 41, Title 28 U. S. C. A. specifically provides that the district courts shall have original jurisdiction of:

> "All cases brought to *enjoin, set aside, annul or suspend,* in whole or in part, any order of the Interstate Commerce Commission."

The very language of the act conferring jurisdiction upon the district court in cases of the character therein enumerated can only have force and effect and be given point on the assumption that Congress recognized that the orders of the Interstate Commerce Commission would be of different kinds and types. The use of the word "enjoin" clearly shows that Congress anticipated that there would be certain orders of the Interstate Commerce Commission which would command the doing or not doing of certain acts or awarding certain relief, and in those instances an injunction is necessary, and in the case of such orders an execution or something analogous thereto will lie to see that the same are enforced.

The use of the phrase "set aside, annul or suspend" clearly indicates that Congress knew that certain orders of the Interstate Commerce Commission would be, in effect, declaratory in nature but, nevertheless, binding—that is, of such a character that while no execution would lie thereon they would, nevertheless, be invested with a legal operative significance which no one would be privileged to ignore and, therefore, it was sufficient to provide that the court should have jurisdiction not to enjoin such orders but to wipe them out and wholly divest them of any legal significance, and this merely by virtue of a decree to that effect.

If the three-judge statutory court had found either that the challenged determination of the Interstate Commerce Commission is or is not an order, such finding would, nevertheless, be a judgment or order regardless of the fact that no execution or other writ, or other means of enforcing the same is provided by law. If the challenged determination of the Interstate Commerce Commission had been held an order, would appellees take the position, that the provision of the judicial code which authorizes a direct appeal from the judgment of the three-judge statutory court, is unconstitutional and void, as seeking to confer upon the Supreme Court of the United States jurisdiction to review something which is not a judgment for the reason that there is no means of enforcing such determination?

It should be pointed out that the difficulties which have risen with respect to the character of the so-called orders which the United States Supreme Court has held cannot be attacked in the courts have been determinations which have been either advisory to or informative on the part of the Interstate Commerce Commission so as to enable it to perform its work or orders denying the relief sought. In performing the duty cast upon it by the Railway Labor Act of determining as to whether or not the lines of the

South Shore railroad were an interurban, the Interstate Commerce Commission was not merely informing itself so as the better to be able to perform its functions or advise Congress in respect to some action which Congress might desire to take, but was performing a duty which, under the act, it had no option to refrain from performing. Under the terms and provisions of that act the Interstate Commerce Commission had no power to deny relief. In other words, it was utterly without jurisdiction to enter a negative order. The Interstate Commerce Commission had to find one way or the other. The Railway Labor Act required it to find that the line of the South Shore was or was not an interurban railroad. It simply could not enter an order refusing to entertain the petition asking it to proceed and determine the status of the line of the South Shore.

Whatever conclusion the Interstate Commerce Commission came to it necessarily results that it entered an order and it was powerless to refrain from entering an order. If the Interstate Commerce Commission had found that the line of the South Shore was an interurban that determination would have been just as binding upon all parties concerned and would have been entitled to just as much respect as if it had found the opposite and, in such circumstances, the appellants would have been equally privileged to attack such determination.

The "report of the Commission" was quasi judicial in character. It fixed the status of the Railroad and thereby determined the liability of the carrier by fixing upon it the obligations imposed by the Railway Labor Act. This in substance is an order under the law. Accordingly, the three-judge statutory court had jurisdiction to review the order and determination of the Commission and it erred in dismissing the suit for want of jurisdiction.

II.

The South Shore Is An Interurban.

The South Shore is operated by electric power and none of its capital stock is owned by any steam railroad. It is not a part of a general steam-railroad system of transportation. Are its operations those of an interurban as that term is used in the proviso in the first paragraph of Section 1 of the Railway Labor Act?

The reasons advanced in various forms for asserting that the South Shore is not an interurban, finally boil down to the one point that about 51 percent of its revenue is derived from the transportation of freight interchanged with steam railroads. If the South Shore had no freight business it would have to be conceded that it is an electric interurban. Does its freight business change that status?

In *United States* v. *Chicago North Shore and Milwaukee Railroad Company,* 288 U. S. 1, 77 L. ed. 583, the court held the electric interurban railway in question was exempt under the exception contained in Section 20A of the Interstate Commerce Act, 49 U. S. C. A. Section 20A provides that

> "as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) * * *."

The section provides that a carrier subject to it shall not issue securities without first applying to the Commission for approval. It was held that the interurban electric railway in question was within the exception and was not required to apply to the Commission for approval of its securities. It appeared that about 22 percent of its revenue was derived from freight and that 87 percent of the carload freight traffic was interchanged with steam roads. The Chicago North Shore and Milwaukee Railroad Company is in all respects similar to the South Shore, the difference between the two being that the freight business of the North Shore had developed to where it was 22 percent of its revenue, while the freight business of the South Shore developed in 1932 to the point where it was 51.45 percent of the total revenue. Both railroads were originally constructed to afford fast electric passenger service. During the seven years from 1909 to 1915 no freight was hauled over the lines now owned by the South Shore. The first freight business on the South Shore property was done in 1916. In 1922 the passenger revenue was $598,355 and the freight revenue $241,268, or 28.7 percent of the total. From this point the freight revenue declined until 1926, when it began to grow and by 1930 had increased to $1,596,246, but it was still less than the passenger revenue (R. 50, 51). Since then both the passenger revenue and the freight revenue have declined rapidly, but the passenger revenue declined more rapidly than the freight revenue. In 1932 the freight revenue amounted to $957,419 and was 51.45 percent of the total revenue, which was the highest percentage reached by the freight.

The South Shore has 2,670 preferred stockholders, members of the public. Its equipment trust obligations are also owned by more than 300 investors, members of the public. The holders of the preferred stock are principally small investors of 5 and 10 share lots. The securities have all been issued with the approval of the State Commissions of Illinois and Indiana, but have never been approved by the Interstate Commerce Commission. It has always been considered that the South Shore, like the North Shore, was exempt as an interurban under the provisions exempting interurbans.

In *Piedmont and Northern Railway* v. *Interstate Commerce Commission,* 286 U. S. 299, 76 L. ed. 1115, the court held that paragraph 22 of Section 1 of the Interstate Commerce Act exempting street, suburban or interurban electric railways (not operated as a part of a general steam railroad system of transportation) from the provisions of paragraphs 18 to 21, requiring a certificate of convenience and necessity for the extension of a line of railroad, did not exempt the Piedmont and Northern Railway. In 1929 its freight revenues were 94.5 percent and its passenger revenues 2.9 percent of the total revenue. Of the freight revenue 95.7 percent was interchanged with steam railroads. The proposed extension would add 128 miles to its present 126 miles and make it the connecting link between the Georgia & Florida Steam Railroad at its southern terminus and the Norfolk & Western at its northern terminus and thereby open a new through and effective route of connecting carriers which would be strongly competitive with existing trunk lines of steam railroad. The court stated, page 311:

> **"It thus appears that petitioner's business is * * * in all essential respects conducted as is the business of the steam freight carriers in the territory served. The differences in construction, equipment, operation and handling are incidental merely to the use of electric motive power in lieu of steam. The purely local traffic in freight, passengers, baggage and express *is relatively inconsequential.* * * * The petitioner's railway is of such importance in interstate commerce and renders a service so predominantly devoted to the handling of interstate freight in connection with steam railroads, is in such relation to connecting steam car-**

> riers, and competes with steam trunk lines in such manner, that in view of the declared policy of the act we cannot hold it an 'interurban' railway within the exemption of the same paragraph."

In the case of the South Shore it cannot be said that the purely local traffic in freight, passengers, baggage and express is relatively inconsequential. The passenger traffic interchanged with steam railroads is less than one-half of one percent of the passenger revenue of the South Shore (R. 47). The passenger revenue of the South Shore prior to 1932 exceeded the revenue from freight in every year and in most of the years greatly exceeded it. Since 1932 the freight revenue has barely preponderated. At present it is about 51 percent from freight and 49 percent from passenger traffic. The South Shore is much nearer to the North Shore case than to the case of the Piedmont & Northern Railway Company.

It was estimated in the Piedmont & Northern Railway Company case that the construction of the proposed extension would result in the diversion of 82,320 cars of freight annually and would more than double the annual revenue. It was stated that for every passenger hauled the Piedmont & Northern hauled a car of freight. Such were the facts before the court when it said that the freight business so predominated and that its business was so pre-eminently interchange freight national in character. The language used referred to a situation where approximately 94.5 percent of the revenue was derived from freight, and does not fairly include a case like the South Shore, which prior to 1931 received more than 50 per cent of its revenue from passenger service, and during the years 1931 to 1934 has received barely 51 per cent of its revenue from freight. With a return of normal conditions it may well be that the South Shore will again receive most of its revenue from passenger service. Obviously a road to be predominantly and pre-eminently devoted to the handling of interstate freight, national in character, should derive substantially all of its revenue from such source.

The record shows that the South Shore has 25 passenger crews and 5 freight crews. It cannot be very well said that the freight business of the South Shore so predominates as to bring the South Shore under the provisions of the Railway Labor Act.

Section 77(m) of the Bankruptcy Act provides that the term "railroad corporation" means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway, which does not derive more than 50 percent of its operating revenues from the transportation of freight. It follows from this provision that an interurban that does derive more than 50 percent of its revenue from freight may be reorganized under Section 77. This is a recognition by Congress that an interurban may derive more than 50 percent of its revenue from freight and still be classed as an interurban. The exception contained in Section 77(m) divides interurban electric railways into two classes, namely: (a) those which do not derive more than 50 percent of their operating revenue from the transportation of freight, and (b) those that do derive more than 50 percent of their operating revenue from the transportation of freight. Those interurbans that do derive more than 50 percent of their operating revenue from the transportation of freight are included in the term "railroad corporations," as used in Section 77 of the Bankruptcy Act.

The percentage of operating revenues derived by the South Shore from the transportation of freight was greatest in the year 1932 when the revenue from freight was 51.45% of the total operating revenues. Before and since 1932 the percentage has been less. The gross revenues of all Class I railroads in the United States, as a whole, amounted to $3,095,448,888 in 1933 and of this amount the passenger revenues were $329,341,854, or 10.6% (R. 51). In 1920 passenger revenues of Class I railroads in the United States were apparently at the peak. In that year the total operating revenues of the Class I railroads of the United States were $6,178,438,459, of which the passenger revenue was $1,288,503,573, or 20.8%. The percentage of operating revenues from the transportation of freight received by the South Shore at its peak was far less than the steam railroads enjoyed.

The South Shore, as an interurban, has a lawful right to carry freight. The city ordinances authorizing the original construction of the railroad authorized the carrying of freight. These were surrendered June 14, 1922, for an indeterminate permit. It has the express right, as an interurban railroad, under a statute of Indiana, passed in 1920, to carry freight. The Supreme Court of Indiana in a suit against the Lake Shore, held that the property now owned and operated by the South Shore was an electric interurban railroad property and held that it had a right to carry freight over its tracks in South Bend, Indiana. *Chicago Lake Shore and South Bend Railroad* v. *Guilfoyle*, 198 Ind. 9; 152 N. E. 167, 46 A. L. R. 1465.

The South Shore was incorporated as a street and interurban railroad under the laws of Indiana for the incorporation of street railroads. It has the charter powers of a street and interurban railroad. It has been admitted to do business as a foreign corporation in Illinois as a street and interurban railroad, with the right to carry passengers and property. Since the South Shore was incorporated as an interurban, and now exists as an interurban corporation with the charter powers granted an interurban under the laws of the state of Indiana, which also give it the right as an interurban to carry freight, the exercise of those charter powers, and the carrying of the freight certainly cannot change its status as an interurban.

Under the laws of Indiana it is well settled (a) that a steam railroad constructed in a public street or highway is an additional servitude, for which an abutting owner is entitled compensation, and (b) that a street railway is not an additional servitude when constructed in a public street or highway and an abutting owner is not entitled to any additional compensation. *Chicago & Calumet Terminal Railway Company* v. *Whiting, Hammond & East Chicago Street Railway Company,* 139 Ind. 297; 38 N. E. 604, 605 and 606; 26 L. R. A. 337; 47 Am. St. Rep. 264.

Three cases in Indiana developed the law to where it is settled that an interurban, when constructed in a public street or highway is not an additional servitude, and an abutting owner is not entitled to any additional compensation, but can only recover for negligent or unlawful operations upon proof of special damages. *Mordhurst* v. *Ft. Wayne & S. W. Traction Co.,* 163 Ind. 268; 71 N. E. 642; *Kinsey* v. *Union Traction Co.,* 169 Ind. 576; 81 N. E. 922, 936 to 947; *Chicago Lake Shore & South Bend Ry. Co.* v. *Guilfoyle,* 198 Ind. 9; 152 N. E. 167; 46 A. L. R. 1465. These cases support the contention of the South Shore that, as an interurban, it is not an additional servitude when constructed in the public streets and, therefore, it is to be classed with street railways and not with the steam railroads.

In *Omaha & Council Bluffs Street Railway Company* v. *Interstate Commerce Commission,* 230 U. S. 324, 57 L. ed. 1501, the court held a street railroad, though engaged in interstate commerce, is not a railroad under the Interstate Commerce Act (49 U. S. C. A. Sec. 1) which provides:

> "The provisions of this chapter shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad," etc.

In *United States* v. *Hubbard*, 266 U. S. 474, 69 L. ed. 389, the provision of the Interstate Commerce Act that "the provisions of this chapter shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad," etc. (49 U. S. C. A. Sec. 1) was held to include any common carrier engaged in the transportation of passengers or property by railroad in interstate commerce. The Interstate Commerce Commission was held to have jurisdiction to prevent unjust discrimination by interurban electric railroads against interstate commerce, although such railroads are not engaged in general transportation of freight in addition to their passenger and express business. The opinion (pp. 478 to 480) called attention to the fact that neither in the act to regulate commerce, February 4, 1887, nor in any amendment thereto prior to that of June 18, 1910, is there any specific reference to electric railroads. The basis for the jurisdiction of the Commission over them is the generality of the language of the original act, which declared in Section 1 that its provisions "shall apply to any common carrier engaged in the transportation of passengers or of property * * * by railroad." As the act made no distinction between railroads operated by steam and those operated by electricity, the Commission made none. Similarly the words "common carrier by railroad" contained *in the Federal Employers' Liability Act, Kansas City Western R. Co.* v. *McAdow,* 240 U. S. 51, 60 L. ed. 520; *in the Safety Appliance Act, Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S. 497, 60 L. ed. 1125, and *in the Hours of Service Act, Denver &*

Interurban R. Co. v. *U. S.*, 236 Fed. 685, were applied to interurban electric railroads. The correctness of the Commission's action in assuming jurisdiction over the interurban roads is confirmed by the action of Congress, which, in recent amendments of the act to regulate commerce, limited, in respect to certain subjects, the authority over them. In doing so, it provided expressly, in five sections, for the exclusion of certain electric railways from the operation of the powers conferred. The five sections referred to are shown in note 7 to the case and among those five sections, excluding interurbans, is the section of the Railway Labor Act which excludes "a street, interurban or suburban electric railway not operating as a part of a general steam railroad system of transportation." The court in *United States* v. *Hubbard,* 266 U. S. 474, while holding that the general language was sufficient to bring the interurban under the jurisdiction of the Interstate Commerce Commission in reference to its rates specifically directed attention to the fact that the five sections of the statutes excluding interurbans, including the exclusion contained in the Railway Labor Act, deprived the Interstate Commerce Commission of jurisdiction of interurbans in those instances.

Kansas City Western Railroad Co. v. *McAdow,* 240 U. S. 51, at 54, 60 L. ed. 520, holding that interurbans are subject to the Employers' Liability Act under the general language, directs attention to the fact that interurbans are by other sections excluded for other purposes by provisos expressly excluding them.

The labor organizations mentioned the fact that the South Shore interchanges passes with railroads subject to the Interstate Commerce Act. This was proper. A carrier subject to the Interstate Commerce Act may issue passes to officers, agents and employes of carriers not subject to the act. The bill of the United States to enjoin the Erie Railroad Company from issuing passes to officers, agents and employes of carriers not subject to the act was dismissed, and on appeal to the United States Supreme Court the case was affirmed. *United States* v. *Erie Railroad Company,* 236 U. S. 259, at 267 to 272, 59 L. ed. 567, 571-3.

It is settled law that a determination by the Interstate Commerce Commission should be set aside (1) if contrary to the indisputable character of the evidence or (2) if the facts found do not, as a matter of law, support the order made. *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* 227 U. S. 88, 91 and 92; 57 L. ed. 431, 433; *Northern Pacific Railroad* v. *Department of Public Works,* 268 U. S. 39, 44 and 45; 69 L. ed. 836, 841; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562; 63 L. ed. 772, 6.

The uncontradicted evidence before the Commission as shown by the transcript of evidence, shows that the petitioners operate lines of interurban electric railway as said term is used in and within the purview of the Railway Labor Act. The correct application to the undisputed facts of the law as announced by the Supreme Court in *Piedmont & Northern Railway* v. *Interstate Commerce Commission,* 286 U. S. 299, and *United States* v. *Chicago North Shore and Milwaukee Railroad,* 288 U. S. 1, leads to the conclusion that the line of railroad operated by petitioners is an interurban electric railway within the meaning of the exemption proviso of the first paragraph of Section 1 of the Railway Labor Act. The determination of the Commission is contrary to all the evidence, and is against the law.

Conclusion.

(1) The three-judge statutory court had jurisdiction to review the order and determination of the Commission and it erred in dismissing the suit for want of jurisdiction.

(2) A correct application of the law to the undisputed facts leads to the conclusion that the lines of the railroad of appellants are an electric interurban railway under the exemption proviso of the first division of Section 1 of the Railway Labor Act and that there is no substantial evidence to support the conclusion and determination of the Commission.

The judgment of the District Court should be reversed.

Respectfully submitted,

John C. Lawyer,
R. Stanley Anderson,
Counsel for Appellants.

APPENDIX.

Determination Made by Interstate Commerce Commission.

At the request of the National Mediation Board pursuant to the proviso to the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, the Interstate Commerce Commission determined that the following lines of railroad operated by electric power are not street, interurban or suburban electric railways within said exemption proviso, viz:

Texas Electric Railway, 208 I. C. C. 193 (March 16, 1935).

Sacramento Northern Railway, 208 I. C. C. 203 (March 16, 1935).

Waterloo, Cedar Falls & Northern Railway, 208 I. C. C. 211 (March 16, 1935).

Piedmont & Northern Railway Company, 211 I. C. C. 4 (October 11, 1935).

Fort Dodge, Des Moines & Southern Railroad Company, 211 I. C. C. 9 (October 11, 1935).

Chicago Tunnel Co. *et al.*, 214 I. C. C. 81 (February 5, 1936).

Chicago South Shore and South Bend Railroad, 214 I. C. C. 167 (February 14, 1936).

Des Moines & Central Iowa R. R., 214 I. C. C. 353 (February 21, 1936).

Utah, Idaho & Central Railroad Co., 214 I. C. C. 707 (March 18, 1936).

Salt Lake & Utah R. R. Co., 214 I. C. C. 717 (March 18, 1936).

Pacific Electric Ry. Co., 215 I. C. C. 414 (May 8, 1936).

Hudson & Manhattan R. R. Co., 216 I. C. C. 745 (July 24, 1936). No freight revenue but 22.97% of total passenger revenue was derived from interline traffic.

Oklahoma Railway Co., 218 I. C. C. 123 (August 3, 1936).

New York, Westchester & Boston Ry. Co., 218 I. C. C. 253 (August 20, 1936). Freight revenue 4.2% of total revenue but held part of the New Haven Steam Railroad System.

In *Chicago North Shore and Milwaukee Railroad Company,* 219 I. C. C. 135 (November 7, 1936) the Commission felt constrained to follow the decision of the United States Supreme Court in *United States* v. *Chicago North Shore and Milwaukee Railroad Company,* 288 U. S. 1, and found that the interurban did fall within the terms of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act. The decision was reluctantly made and the Commission said:

> "Undoubtedly this is a close or borderline case, but considering the view expressed by the Supreme Court in the case hereinbefore cited, together with the absence of any opposition of record to the contention that the carrier is exempt, and the fact that no carload freight is handled to or from or interchanged at either of the two principal terminals which are much the largest cities served, the doubt must be resolved in favor of holding that the carrier falls within the exemption."

The Texas Electric Railway Case.

The Texas Electric Railway Company filed a bill of complaint for an injunction and petition for declaratory judgment against Clyde O. Eastus, United States Attorney for the Northern District of Texas, in the District Court of the United States for the Northern District of Texas at Dallas, seeking injunctive relief against prosecution for violation of the provisions of the Railway Labor Act, and a declaratory judgment decreeing plaintiff to be a street, interurban or suburban electric railway and not subject to the provisions of the Railway Labor Act. The defendant filed an answer and among other things by paragraph 19 alleged that:

> "The determination of the Interstate Commerce Commission has not been enjoined, set aside, annulled, or suspended by a statutory three-judge court under the Urgent Deficiencies Act of October 2, 1913 (38 Statutes 208, U. S. C. Title 28 Sec. 47) and accordingly must be accepted by the court as conclusive."

The determination and report of the Interstate Commerce Commission in the Texas Electric Railway matter, 208 I. C. C. 193, was attached as a part of the answer.

The District Court granted an interlocutory injunction and the matter is still pending.

Freight revenue was 16% of the passenger revenue in 1929, 30% in 1930, 37% in 1931, 53% in 1933 and 54% for the first half of 1934.

The Utah Idaho Central Case.

The Utah Idaho Central Railroad Company filed a bill of complaint for injunction and petition for declaratory judgment against Dan B. Shields, United States Attorney for the District of Utah, seeking an injunction against the enforcement of the Railway Labor Act and a declaratory judgment decreeing that the plaintiff was a street, interurban or suburban electric railway and not subject to the provisions of the Railway Labor Act.

The defendant filed his answer and the Interstate Commerce Commission intervened and answered. The United States District Court for the District of Utah on October 15, 1936, entered a decree adjudging that the plaintiff was an interurban electric railway and exempt from the provisions of the Railway Labor Act.

The case has been appealed to the United States Circuit Court of Appeals for the Tenth Circuit and is now pending in that court.

During the five year period from 1930 to 1934 the freight revenue of the railway was 81.9% of the total revenue.

REPLY

BRIEF

FEB

CHARL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1937.

No. 502

JOHN N. SHANNAHAN and CLAUDE J. JACKSON, as Trustees of the Property of Chicago South Shore and South Bend Railroad, et al.,

Appellants.

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Reply Brief for Appellants.

John C. Lawyer,
R. Stanley Anderson,
Counsel for Appellants.

CHICAGO LAW PRINTING CO., 111 N. WACKER DRIVE (COR. WASHINGTON ST.) TEL. FRANKLIN 6821

SUBJECT INDEX.

PAGE

The three judge statutory court had jurisdiction 1

The South Shore is an interurban 5

Table of Cases.

Baltimore & Ohio RR Co. v. United States, 264 U. S. 258 2

Great Northern Ry Co. v. United States, 277 U. S. 172 4

Hooker v. Knapp, 225 U. S. 306 2

Lehigh Valley RR Co. v. United States, 243 U. S. 412 .. 3

Mitchell Coal & Coke Co. v. Pennsylvania Railroad Co., 230 U. S. 247; 57 L. ed. 1472 4

Myers v. Bethlehem Building Corporation (Advance Sheets) .... U. S. ....; 82 L. ed. 399 4

Nashville, Chattanooga & St. Louis RR Co. v. Wallace, 288 U. S. 249 2

Piedmont & Northern Ry Co. v. United States, 280 U. S. 469 3

Proctor & Gamble Co. v. United States, 225 U. S. 282 2

United States v. Baltimore & Ohio RR Co., 293 U. S. 454 5

PAGE

United States Navigation Co. Inc. v. Cunard Steamship Co., 284 U. S. 474; 76 L. ed. 408 4

Virginian Railroad Co. v. System Federation No. 40, etc. et al., 300 U. S. 515 5

Woodrich v. Northern Pacific Railway Co., 71 Fed. (2d) 732; 97 A. L. R. 401 4

STATUTES CITED.

Interstate Commerce Act, Sec. 1(22) and Sec. 20a(1) of part 1 5

Safety Applicance Act of Aug. 26, 1937, 49 U S C A Sec. 26(a) 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937.

No. 502

JOHN N. SHANNAHAN AND CLAUDE J. JACKSON, AS TRUSTEES OF THE PROPERTY OF CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Reply Brief for Appellants.

I.

The three-judge statutory court had jurisdiction.

Appellees claim that the determination of the status of the carrier by the Interstate Commerce Commission was not an order which, under the Urgent Deficiencies Act, the three-judge statutory court had jurisdiction to set aside because:

1. There was nothing in the Commission's determination that could be enforced;
2. The determination results in no injury, the injury coming from the statute; and
3. The determination was not made by the Commission in the performance of its duties under the Act to Regulate Commerce.

1. Appellees rely on the cases of *Proctor & Gamble Co.* v. *United States,* 225 U. S. 282, 293-294, and *Hooker* v. *Knapp,* 225 U. S. 306, to support their contention that there is nothing in the Commission's determination that could be enforced. The order in the case at bar is distinguishable from the cases relied upon by Appellees on the same ground that this court distinguished the order in *Baltimore & Ohio Railroad Company* v. *United States,* 264 U. S. 258, 264. In the cases of *Proctor & Gamble Co.* v. *United States,* and *Hocker* v. *Knapp,* the order denied the affirmative relief sought. In the case of *Baltimore & Ohio Railroad Company* v. *United States* and the case at bar, the order is affirmative—that is, it grants the full relief sought.

The determination by the Commission is an order because it fixed for the first time, by the only body authorized by law so to do, the status of the carrier. It is in this respect self-executing. *Nashville Chattanooga & St. Louis RR. Co.* v. *Wallace,* 288 U. S. 249, 259-264. By fixing the status the liability of the carrier was determined in reference to the obligations imposed by the Railway Labor Act. Such determination, *after hearing,* was *quasi* judicial in character and therefore reviewable in court. Under the statute this determination is in law an order that may be "set aside."

2. Appellees in support of their argument that the determination results in no injury, the injury coming from the statute, rely on *Lehigh Valley RR. Co.* v. *United States*, 243 U. S. 412, and *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469. In the *Lehigh* case the petition was dismissed and in the *Piedmont* case the application for a certificate of convenience and necessity was denied. Both orders were negative in substance and in form and fall squarely within the rule of *Proctor & Gamble Co.* v. *United States*. The petition in the *Lehigh* case having been dismissed and the application in the *Piedmont* case denied, the risk the carrier ran necessarily flowed from the statute and not from the order. However, in the case at bar the relief sought was not denied; but on the contrary the relief requested was given and the determination of the status of the carrier was made.

In the *Lehigh* case the statute applied if the Commission granted no relief. Hence when the Commission dismissed the petition of the carrier, the injury it might sustain flowed from the statute and not from the Commission's order. The same is true as to electric interurbans under the Safety Appliance Act of August 26, 1937 (49 U. S. C. A. Sec. 26(a)). In the case at bar the Commission having made the determination fixing the status of the carrier, the injury flows from the determination, just as the injury flows from a decree of divorce or adjudication of bankruptcy and not from the statute authorizing the divorce or the bankruptcy proceedings. If the Commission had determined that the carrier in the case at bar was an interurban and hence within the exemption proviso of the act, surely the determination would be an order and subject to review.

In the *Piedmont* case the statute required a certificate of convenience and necessity for an extension but exempted interurbans. The carrier's application for a certificate was denied. Clearly the risk flowed from the statute. If the statute had authorized the Commission to determine the status and such determination had been made, the risk would then flow from such determination.

In the case at bar a legal injury flows from the erroneous determination of the status of the carrier as such erroneous determination for the first time brings the carrier under the Railway Labor Act. This status is fixed on the carrier by the determination of the Commission, contrary to law and without substantial supporting evidence.

The determination of the status of the carrier by the Commission is a condition precedent to the enforcement of the provisions of the Railway Labor Act against the carrier. The prescribed administrative remedy must first be invoked and exhausted.

> *Myers* v. *Bethlehem Building Corporation* (Advance Sheets) ...... U. S. ......; 82 L. ed. 399, 404-5.
>
> *Mitchell Coal & Coke Co.* v. *Pennsylvania Railroad Co.,* 230 U. S. 247, 255-258; 57 L. ed. 1472, 1476.
>
> *United States Navigation Co. Inc.* v. *Cunard Steamship Co.,* 284 U. S. 474, 485; 76 L. ed. 408, 411-415.
>
> *Woodrich* v. *Northern Pacific Railway Co.,* 71 Fed. (2d) 732, 734, 735; 97 A. L. R. 401, 404, 405; Note 406.

3. Appellants cite *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, to support their contention that the determination was not made by the Commission in the performance of its duties under the Act to Regulate Commerce.

The remedy under the Urgent Deficiencies Act to set aside orders of the Commission is not limited to orders made by the Commission in the performance of its duties under the Interstate Commerce Act. An order of the Commission under the Boiler Inspection Act was set aside under the Urgent Deficiencies Act in *United States* v. *Baltimore & Ohio RR. Co.*, 293 U. S. 454, 458-462. The Railway Labor Act has been held to be a constitutional exercise by Congress of its power to regulate interstate commerce. *Virginian Railroad Co.* v. *System Federation No. 40, etc., et al.*, 300 U. S. 515, 553-559. The duty of the Commission to determine the status of the carrier under the Railway Labor Act is clearly and obviously an exercise of the power and duties conferred and imposed upon the Commission by Congress to regulate interstate commerce.

II.

The South Shore is an interurban.

In addition to the Railway Labor Act many other statutes exempt interurban electric railways from compliance with their requirements. These statutes have been cited at page 17 of Appellants' brief. The Appellees at page 22 of their brief call attention to repeated reports of the Commission pointing out that the statutory language exempting interurbans "was unsatisfactory" to the Commission. The fifty-first annual report of the Interstate Commerce Commission, issued November 1, 1937 at page 107, again recommends to Congress "that Section 1(22) and Section 20a(1) of part 1 of the Interstate Commerce Act be amended by substituting provisions exempting from our jurisdiction all street, surburban and interurban electric railways, except such as are operated as a part of general steam railroad systems of transportation *or are engaged in the general transportation of freight and interchange standard steam railroad freight equipment with* *steam railroads for transportation of interstate or foreign commerce to or from points on their lines * * *.*" This recommendation does not include an amendment to the exemption proviso of Section One of the Railway Labor Act. This recommendation if necessary is inconsistent with the determinations by the Commission (cited at pp. 51 and 52 in the appendix to Appellants' brief) denying the electric railways the status of interurbans because of their freight business. These recommendations commenced with the thirty-fifth annual report of the Commission made in 1921. Congress has not seen fit to act on the recommendations. In 1933 Congress by Section 77(m) of the laws relating to bankruptcy defined the term "railroad corporation" for the purposes of said Section 77 as meaning any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, suburban or interurban electric railway which is not operated as part of a general steam railroad system of transportation or which does not derive more than 50 per cent of its operating revenue from the transportation of freight in standard steam railroad freight equipment. Congress in said Section 77 recognized that an interurban may derive more than 50 per cent of its operating revenues from the transportation of freight in standard steam railroad freight equipment and still maintain its status as an interurban.

We believe our first brief fully answers all other arguments made by Appellees.

We respectfully submit that the judgment of the District Court should be reversed.

Respectfully submitted,

John C. Lawyer,
R. Stanley Anderson,
Counsel for Appellants.

INDEX

Page
Opinion below 1
Jurisdiction 1
Question presented 2
Statutes involved 2
Statement 4
Summary of argument 9
Argument:
I. The three-judge court did not err in holding that it had no jurisdiction over appellants' suit to correct and enjoin the Commission's determination that their line was not exempt from the requirements of the Railway Labor Act 10
A. The court lacked jurisdiction under the Urgent Deficiencies Act to set aside the Commission's determination because there was nothing in the determination which it could enforce 10
B. The sole function of the three-judge court under the Urgent Deficiencies Act is to protect plaintiffs from damage or detriment resulting from invalid orders by the Commission. In the case at bar the lower court lacked jurisdiction because it does not appear that the Commission's determination will result in any substantial detriment to plaintiffs 12
C. The duty imposed upon the Commission to determine whether an electric line comes within the proviso of the Railway Labor Act is a special duty, separate from and no part of the scheme for the regulation of the railroads under the Interstate Commerce Act. Suits under the Urgent Deficiencies Act will lie only when they seek to set aside orders made by the Commission in the performance of its duties under the Act to Regulate Commerce 17

Argument—Continued. Page
- II. This Court should not set aside the determination of the Interstate Commerce Commission that the South Shore is not an interurban electric railway 20
  - A. The determination by the Interstate Commerce Commission that the South Shore does not come within the exemption proviso for interurban railways is binding upon the courts unless arbitrary, capricious, or not based upon substantial evidence 21
  - B. The determination by the Interstate Commerce Commission that the South Shore was not an interurban is not arbitrary, or capricious, or without substantial evidence to support it. 25

Conclusion 31

Cases:

Alton R. Co. v. *United States*, 287 U. S. 229 20
Application of Section 15A of the Interstate Commerce Commission Act to Electric Railways, 86 I. C. C. 751 30
Butte, Anaconda & Pacific Ry. Co. v. *United States*, 290 U. S. 127 15
Great Northern Ry. Co. v. *United States*, 277 U. S. 172 17
Hooker v. *Knapp*, 225 U. S. 306 12
Houston v. *St. Louis Independent Packing Co.*, 249 U. S. 479. 24
Illinois Central R. Co. v. *Interstate Commerce Commission*, 206 U. S. 441 23
Interstate Commerce Commission v. *Union Pacific R. Co.*, 222 U. S. 541 24
In the Matter of the Application of the Western Pacific Railroad Company for Authority to Acquire Control of the Sacramento Northern Railway and to Purchase the Bonds of the Sacramento Northern Railroad, 71 I. C. C. 653 30
Lehigh Valley R. R. Co. v. *United States*, 243 U. S. 412 .... 13, 14, 15
Morgan v. *United States*, 298 U. S. 468 15
Piedmont & Northern Ry. Co. v. *Interstate Commerce Commission*, 286 U. S. 299 .... 21, 22, 27, 29
Piedmont & Northern Ry. Co. v. *United States*, 280 U. S. 469. 15
Procter & Gamble Co. v. *United States*, 225 U. S. 282 .... 11, 12
Proposed Construction of Lines by Piedmont & Northern Ry. Co., 138 I. C. C. 363 30
Proposed Control of Sacramento Northern by W. P. R. R., 79 I. C. C. 782 30
Railway Mail Pay: In the Matter of the Application of the Illinois Terminal Company, 174 I. C. C. 796 30
Rules for Testing Other Than Steam Power Locomotives, 122 I. C. C. 414 .... 7, 30
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297 .... 24, 27
Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420 15

Cases—Continued. Page

United States v. *Atlanta, Birmingham, & Coast R. Co.*, 282 U. S. 522 16
United States v. *Baltimore & Ohio R. Co.*, 293 U. S. 454 18
United States v. *Brooklyn Terminal*, 249 U. S. 296 31
United States v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1 21, 22, 27, 29
United States v. *Corrick*, 298 U. S. 435 2
United States v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299 16
United States v. *Louisville & Nashville R. Co.*, 235 U. S. 314 23
Virginian Ry. v. *United States*, 272 U. S. 658 23, 24, 27
Virginian Ry. v. *System Federation No. 40*, 300 U. S. 515 18

Statutes:
Boiler Inspection Act, Feb. 17, 1911, 36 Stat. 913 18
Commerce Court Act of June 18, 1910, c. 309, 36 Stat. 539 11, 12
Interstate Commerce Act 13, 21, 28, 29
Locomotive Inspection Act, 43 Stat. 659, U. S. C., Title 45, § 22 21
Panama Canal Act of Aug. 24, 1912, 37 Stat. 566 13, 14, 15
Railway Labor Act of 1926, 44 Stat. 577 21, 22
Railway Labor Act, as amended June 21, 1934, 48 Stat. 1185, U. S. C., Title 45, § 151 2, 5, 7, 9, 10, 16, 18, 19, 20, 21, 29, 30
Transportation Act, 1920, 41 Stat. 469 17, 18, 21
Urgent Deficiencies Act of Oct. 22, 1913, c. 32, 38 Stat. 208 2, 3, 7, 8, 9, 10, 11, 13, 17, 19

Miscellaneous:
Annual Reports of the Interstate Commerce Commission, 35th, pp. 21, 58; 36th, pp. 30, 32, 76; 37th, p. 70; 38th, pp. 20, 78; 39th, pp. 20, 32, 72; 40th, pp. 20, 31; 41st, p. 6; 42nd, pp. 5, 79, 80, 83; 43rd, pp. 10, 89; 44th, pp. 22–23, 96; 45th, p. 122; 46th, pp. 20, 51, 73; 48th, pp. 15–16; 49th, pp. 20, 33–34, 97–98 22
Hearings before House Committee on Interstate and Foreign Commerce, 73rd Cong., 2nd Sess., H. R. 7650, pp. 22, 84 23
Hearings before Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., S. 3266, pp. 22, 35, 158, 162 23

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 502

JOHN N. SHANNAHAN AND CLAUDE J. JACKSON, AS TRUSTEES OF THE PROPERTY OF THE CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, AND CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court of the United States for the Northern District of Indiana (R. 22-27) is reported in 20 F. Supp. 1002.

JURISDICTION

The decree of the District Court was entered on September 17, 1937 (R. 29). The petition for appeal was filed on the same day (R. 30). The appeal was filed in this Court on October 14, 1937, and this Court noted probable jurisdiction on November 8, 1937.

Appellants base their appeal to this Court upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–220, providing that all suits to suspend or set aside an order of the Interstate Commerce Commission shall be heard by three judges, and that appeal should lie directly to this Court. Appellees deny that this suit could be brought under the Urgent Deficiencies Act, but concede that this Court has jurisdiction on appeal, not of the merits but to determine whether the lower court erred in declining to entertain the suit. *United States* v. *Corrick,* 298 U. S. 435, 440.

QUESTION PRESENTED

Is the determination of the Interstate Commerce Commission that the Chicago, South Shore and South Bend Railroad is not an interurban electric railway within the meaning of the exemption proviso in Section 1 of the Railway Labor Act an order subject to review by a three-judge court under the Urgent Deficiencies Act?

STATUTES INVOLVED

Section 1, First, of the Railway Labor Act, as amended June 21, 1934, 48 Stat. 1185, U. S. C., Title 45, Sec. 151, reads as follows:

> **FIRST. The term "carrier" includes any express company, sleeping-car company,**

carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. **The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.**

The pertinent provisions of the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–220, as they now read in U. S. C., Title 28, Secs. 41 (28), 46, and 47, read in part as follows:

> **Sec. 41. The district courts shall have original jurisdiction as follows:**

(28) Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

* * * * *

SEC. 46. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States.

* * * * *

SEC. 47. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. * * *; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

STATEMENT

On August 9, 1934, the National Mediation Board requested the Interstate Commerce Commission to determine whether the Chicago, South Shore and

South Bend Railroad (hereinafter called the South Shore) fell within the terms of the proviso exempting certain interurban electric railways from the operation of the Railway Labor Act (R. 3, 6). On May 17, 1935, the Interstate Commerce Commission, pursuant to said request of the National Mediation Board, gave notice to the South Shore that the matter of determining the status of the South Shore under Section 1 of the Railway Labor Act had been assigned for a hearing at the Hotel Morrison, Chicago, Illinois, June 25, 1935 (R. 3, 8). At that time the South Shore appeared and offered and introduced evidence, both oral and documentary, in support of its claim that it was an interurban railway and exempt from the Railway Labor Act (*ibid.*). On August 9, 1935, the railroad filed its brief with the Commission, and the case was argued orally before the Commission on November 19, 1935 (*ibid.*). The appellants, Shannahan and Jackson, as Trustees of the South Shore, filed their written entry of appearance with the Commission on December 30, 1935 (*ibid.*).

On February 14, 1936, the Interstate Commerce Commission handed down its decision (214 I. C. C. 167). The report is printed in the record at pages 13-22. After setting forth the facts relating to the manner in which the South Shore operates its road and the reasons for the decision reached, the Commission concluded (R. 22):

> We find that the line of the Chicago South Shore and South Bend Railroad is not a

street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act.

The basic facts upon which the Commission relied in reaching the conclusion that the South Shore was not an interurban electric railway were the following:

(a) During each of the four years preceding the hearing the freight revenues of the carrier exceeded its passenger revenues (R. 18, 21, 51).

(b) The freight is carried in standard freight equipment, most of which is furnished by the steam railroads (R. 18, 21).

(c) Ninety per cent of the freight handled is interchanged with other railroads and moves in interstate commerce (R. 18, 21). The number of carloads of freight interchanged in recent years has ranged from 29,674 to 58,790 per year (R. 18).

(d) The freight carried is of a mixed character, with coal and grain furnishing the largest volume (R. 18).[1]

(e) The freight is generally hauled in freight trains consisting of forty to fifty cars and sometimes more. The carrier is a party to a large number of tariffs publishing joint rates to and from points throughout the country (R. 18).

---

[1] No livestock is handled, because of a deed restricting the use of six miles of the right of way (R. 18).

(f) The carrier is an intermediate carrier on a large quantity of through traffic interchanged with other roads (R. 18, 21).

(g) Even before the amendment to the Railway Labor Act in 1934, which authorized the Interstate Commerce Commission to determine whether electric railways were interurban, the Commission had held the South Shore not to be a street, interurban, or suburban electric railway (R. 20; *Rules for Testing Other Than Steam Power Locomotives*, 122 I. C. C. 414 (1925)).

On April 13, 1936, appellant filed a petition for rehearing with the Interstate Commerce Commission. This petition was denied on May 11, 1936 (R. 4, 8, 56–57).

On June 22, 1936, appellants filed in the United States District Court for the Northern District of Indiana a suit to set aside, annul, and suspend the enforcement of the Commission's "order, finding, and determination" (R. 1–6). The suit was brought against the United States, jurisdiction of the court being invoked under the Urgent Deficiencies Act. The petition alleged that Shannahan and Jackson were Trustees of the South Shore, appointed in proceedings brought under Section 77 of the Bankruptcy Act, and that the District Court had authorized them to commence the suit. The petition also alleged that the determination of the Commission was contrary to the evidence, incorrect in law, and arbitrary, and "that pursuant to said order, finding, and determination complained of above, said National Mediation Board is threatening to take, and has taken, jurisdiction of proceedings for the purpose of enforcing the provisions of said Railway Labor Act, * * *" (R. 5).

The prayer of the petition is that the Commission's "order, finding, and determination * * * be set aside, annulled, and suspended and that the enforcement of said order, finding, and determination be enjoined," and further, that the Court find and determine that the petitioners' road is an interurban electric railway not subject to the Railway Labor Act (R. 5).

The United States filed an answer in which it denied the allegations as to the illegality of the Commission's decision (R. 7–9). The United States also alleged as a separate defense that the so-called order of the Interstate Commerce Commission was not an order within the meaning of the Urgent Deficiencies Act, and that, accordingly, the statutory three-judge court was without jurisdiction to hear and determine the case. The Interstate Commerce Commission intervened as party defendant and filed a similar answer (R. 9–11).

The District Judge (Judge Slick) called Circuit Judge Evans and District Judge Baltzell to his assistance and the case was submitted to the three judges on May 18, 1937. The evidence before that court consisted of the report of the Interstate Commerce Commission (R. 13–22, 56), the testimony taken before the Commission (R. 38–56), and certain documents tending to show that the National Railway Adjustment Board was claiming jurisdiction over the carrier's relations with its employees under the Railway Labor Act (R. 57–61).

On August 16, 1937, the District Court handed down an opinion in which it found that the Commission's determination was not an order within the meaning of the Urgent Deficiencies Act and that, accordingly, the court had no jurisdiction (R. 22–24). The court did not consider the merits of the case in its opinion or in its findings of fact and conclusions of law (R. 27–28). District Judge Slick dissented on the ground that the Commission's determination was an order in substance, though not in form, in that it finally determined the status of the carrier under the Railway Labor Act (R. 25–27).

The final decree dismissing the case for want of jurisdiction was entered September 17, 1937 (R. 29). On the same day appellants filed a notice of appeal to this Court, and the appeal was allowed and has been perfected (R. 30–33).

SUMMARY OF ARGUMENT

I. The lower court properly held that it had no jurisdiction over appellants' suit to enjoin the Commission's determination that their line was not exempt from the Railway Labor Act. There was nothing in the Commission's determination which could be enforced. The determination would not result in any substantial detriment to appellants, any injury to appellants coming from the statute and not from the determination. The Commission's determination was not a part of *its* ordinary power to regulate commerce, and accordingly is not covered by the Urgent Deficiencies Act.

II. The determination by the Interstate Commerce Commission that a particular carrier does not come within the exemption proviso for interurban railways in the Railway Labor Act is binding upon the courts unless arbitrary, capricious, or not based upon substantial evidence. The Commission's determination that the South Shore, a line deriving over 50 per cent of its revenue from freight traffic and carrying its freight in substantially the same manner as do trunk line railroads, was not an interurban, is not arbitrary, capricious, or without substantial evidence to support it.

ARGUMENT

I

THE THREE-JUDGE COURT DID NOT ERR IN HOLDING THAT IT HAD NO JURISDICTION OVER APPELLANTS' SUIT TO CORRECT AND ENJOIN THE COMMISSION'S DETERMINATION THAT THEIR LINE WAS NOT EXEMPT FROM THE REQUIREMENTS OF THE RAILWAY LABOR ACT

A. THE COURT LACKED JURISDICTION UNDER THE URGENT DEFICIENCIES ACT TO SET ASIDE THE COMMISSION'S DETERMINATION BECAUSE THERE WAS NOTHING IN THE DETERMINATION WHICH IT COULD ENFORCE

The jurisdictional scope of the three-judge district court is limited to that of its predecessor, the

Commerce Court, created by the Commerce Court Act of June 18, 1910, c. 309, 36 Stat. 539. This jurisdiction was stated in the Act to be that then possessed by the Circuit Courts of the United States over cases of four kinds, which included, first, cases for the enforcement of orders of the Interstate Commerce Commission (other than orders for the payment of money) and, second, "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

By the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, the Commerce Court was abolished and its functions were, in gross, transferred to the several district courts to be performed by a specially constituted court and under procedure specified in detail in that Act.

This jurisdiction came to the District Courts defined and limited by the decision of the Supreme Court in *Proctor & Gamble Co.* v. *United States,* 225 U. S. 282, where the Court (pp. 293–294) pointed out the co-relation of the provisions of the statute regarding suits brought to enforce orders of the Commission and those brought to set aside such orders. It held that the Commerce Court had jurisdiction to enjoin and set aside under the SECond clause of such Act only such orders of the Commission as could be the subject of a suit for the enforcement thereof under the first clause. The Court said: "Thus, the first subdivision provides for the enforcement of orders; that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission, and the second (the one with which we are concerned) dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph. In other words, by the cooperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and on the other hand, power is conferred to stay the enforcement of an illegal order." Obviously, no suit "for the enforcement" of the Commission's determination as to the South Shore railroad would lie in the Commerce Court under the first paragraph of Section 207 of the Commerce Court Act, or in a three-judge court. Hence, the lower court had no jurisdiction under the second paragraph of the Urgent Deficiencies Act. See also *Hooker* v. *Knapp,* 225 U. S. 306.

B. THE SOLE FUNCTION OF THE THREE-JUDGE COURT UNDER THE URGENT DEFICIENCIES ACT IS TO PROTECT PLAINTIFFS FROM DAMAGE OR DETRIMENT RESULTING FROM INVALID ORDERS BY THE COMMISSION. IN THE CASE AT BAR THE LOWER COURT LACKED JURISDICTION BECAUSE IT DOES NOT APPEAR THAT THE COMMISSION'S DETERMINATION WILL RESULT IN ANY SUBSTANTIAL DETRIMENT TO PLAINTIFFS

The statutory courts have no "corrective" functions. The Court in the *Proctor & Gamble* case answers in the affirmative its question asked in its opinion (225 U. S., p. 292) whether the authority of the Commerce Court is "confined to enforcing or restraining, as the case may require, affirmative orders of the Commission." Another question asked by the Court in the opinion above referred to (p. 292) negatives the corrective jurisdiction of the statutory courts. The question as stated and answered is whether the Commerce Court may award the relief which the Commission was authorized by statute to grant but which the Commission had mistakenly refused.

Since the finding of the Commission is followed by no order against the South Shore from which it needs to be protected, the three-judge court has no jurisdiction. Appellants ask it to do what is beyond its power, to *advise* or *correct* the Commission.

In *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412 (234 Fed. 682), this Court held that a three-judge court under the Urgent Deficiencies Act did not have jurisdiction over a determination of the Commission under the Panama Canal Act of August 24, 1912, 37 Stat. 566, now Interstate Commerce Act, Section 5 (19), (20), and (21), that a plaintiff railroad was not exempt from the prohibition of the statute against operating competing water carriers. This because the Commission's so-called "order" was negative in substance, as well as in form, and, hence, not capable of being enjoined. Also because "The risk to which the railroad was left subject [that of prosecution for failure to divest itself of its interest in the boat lines] did not come from the order but from the abovementioned Section of the Panama Canal Act * * *. This risk is the same that it was before the order or that it would have been if appellant had not applied to the Commission, except so far as the findings establish facts that we believe there is no desire to dispute * * *" (p. 414).

The more detailed discussion of the legal aspects of the Panama Canal Act and the orders of the Commission thereunder by the lower court in the above-cited case (see 234 Fed. 695–696) apparently approved by this Court, emphasizes the similarity of that case to the case at bar. Here the Railway Labor Act, by its terms, applies to all carries subject as the South Shore admittedly is, to the Interstate Commerce Act. The Act, however, exempts from its provisions certain kinds of electric lines and authorizes and directs the Commission to say what electric lines are of the kind which are exempted. The Commission, in its report, has said that the South Shore is not the kind of railroad exempted from provisions of the Act. In the *Lehigh* case the Commission found that that carrier was not exempt from the operation of the Canal Act (234 Fed. 695). In both instances the carrier was left exposed to the statutory requirements and the prescribed penalties in case of failure to comply with the requirements. In both cases the risk to which the carrier is left subject does not come from the order but from the statute (243 U. S. 414).

If it be suggested that the *Lehigh* case is not authority in the case at bar because the Panama Canal Act provides specifically that "the order of the Commission shall be final," we point out that this clause merely expresses what this Court has uniformly held with respect to the Commission's findings upon questions committed to its determination by Congress. See *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 444; *Morgan* v. *United States,* 298 U. S. 468, 498; *Butte, Anaconda & Pacific Ry. Co.* v. *United States,* 290 U. S. 127.

In *Piedmont & Northern Ry. Co.* v. *United States,* 280 U. S. 469, this Court held that the Urgent Deficiencies Act did not confer jurisdiction upon a three-judge court to set aside a finding by the Commission that the plaintiff's line was not an interurban electric exempt from a statutory prohibition against extension without authority of the Commission. Referring to the risk of prosecution under the statute or of financial loss, and citing the *Lehigh Valley* case, *supra,* the Court said (p. 476): "These risks arise, however, not from the order, but from the statute." Again the Court said (p. 477): "The penalties provided in paragraph (20) [of Section 1 of the Interstate Commerce Act] are prescribed, not for violation of an order of the Commission, but for violation of the provisions of the statute."

It should be noted that the appellants' petition (R. 1–6) makes no claim that the enforcement against it of the provisions of the Railway Labor Act (threatened, it is alleged, by the National Mediation Board) will result in any damage or detriment, irreparable or otherwise. This emphasizes the obvious fact that plaintiffs were seeking in the court below relief of a purely "corrective" character, a decision that the lines are interurban electric and within the exemption stated in the Labor Act. This is exactly what the Act specifically directs the Commission to do, and for a court to do it would be an unauthorized assumption by the court. For this reason the lower court was right in denying jurisdiction.

In *United States* v. *Atlanta, Birmingham & Coast R. Co.*, 282 U. S. 522, the Court held that the three-judge court had no jurisdiction to set aside a report of the Commission in which the Commission found that a certain item in the carrier's account should not exceed a named figure, and concluded with the statement that the carrier "would be expected" to adjust its accounts accordingly within a prescribed time. The Court points out that "No case has been found in which matter embodied in a report and not followed by a formal order has been held subject to judicial review."

In *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, the Court held that although designated an "order" by the Commission, a "final valuation" of the property of the complaining carrier did not come within the scope of the relief provided for in the Urgent Deficiencies Act.

C. THE DUTY IMPOSED UPON THE COMMISSION TO DETERMINE WHETHER AN ELECTRIC LINE COMES WITHIN THE PROVISO OF THE RAILWAY LABOR ACT IS A SPECIAL DUTY, SEPARATE FROM AND NO PART OF THE SCHEME FOR THE REGULATION OF THE RAILROADS UNDER THE INTERSTATE COMMERCE ACT. SUITS UNDER THE URGENT DEFICIENCIES ACT WILL LIE ONLY WHEN THEY SEEK TO SET ASIDE ORDERS MADE BY THE COMMISSION IN THE PERFORMANCE OF ITS DUTIES UNDER THE ACT TO REGULATE COMMERCE

In *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, this Court held that a three-judge court lacked jurisdiction to entertain a suit to set aside a certificate issued by the Commission to the Secretary of Treasury under Section 209, Transportation Act, 1920, stating the Commission's finding of the amount required to make good the guaranty of operating income during the six months following federal control. The Court said (p. 180):

> The function imposed upon the Commission by § 209 is solely that of determining the amount required to make good the Government's guaranty. It is not an exertion of the delegated power to regulate interstate commerce. * * *
>
> Transportation Act, 1920, did not confer upon the Commission power to order anything in connection with the issue of the certificates. There is in the certificates no direction, no word of command. They are the recital of a finding of fact. * * * Be-

> cause issuing certificates is not a part of the Commission's delegated power to regulate commerce and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality or correctness of its action in doing so.

All that the Court has said as to Section 209 is true of the Railway Labor Act and the Commission's single function under it—that of determining whether a given electric railway falls within the exemption proviso of the Act. Clearly this is not a phase of the *Commission's* ordinary power to regulate commerce. The Labor Act is much further dissociated from the Interstate Commerce Act than was the Transportation Act, 1920. By no stretch of reasoning can it be concluded that the Commission's determination in the case at bar comes within the scope of *its* delegated power to regulate commerce, notwithstanding the contrary assertion found on page 34 of appellants' brief. Nor do the two cases cited by appellants in any way support appellants' contention. The *Power Reverse Gear Case* (*United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454), cited by appellants, involved an order made by the Commission under the Boiler Inspection Act, which directly concerns the power used by the carriers in moving interstate commerce. Appellants' other case (*Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515) holds not that the Commission's determination under the

Railway Labor Act is an exercise by the Commission of its delegated power to regulate commerce but that the Act itself is a proper exercise by Congress of its powers under the commerce clause of the Constitution.

In conclusion upon the question of jurisdiction: Under authority of the cases cited above, the lower court correctly ruled that, as a three-judge court convened pursuant to the Urgent Deficiencies Act, its jurisdiction was strictly limited by the statute, and that the appellants' suit was not within the scope of its jurisdiction. Nothing submitted by appellants would justify a contrary result. Hence, the decision and order of the lower court should be affirmed. It is with some regret that appellees have come to this conclusion, because the direct proceeding before a three-judge court to review determinations of the Commission under the Railway Labor Act would be much more satisfactory and expeditious for the government and the Commission, as well as for the carrier concerned, than the devices for indirect collateral attack upon the Commission's findings otherwise available.[2]

---

[2] In a number of cases review of the determination of the Interstate Commerce Commission that a particular electric railway did not fall within the exempting proviso of the Railway Labor Act has been sought in suits against United States attorneys to prevent enforcement of the criminal provisions of the Act. Such cases are heard before a single district judge, and appeal lies to the Circuit Court of Appeals. The cause of action is necessarily based upon proof of violation of the statute by the carrier and of threats to prose-

Notwithstanding the considerations above expressed, the conclusion seems to us inescapable that the action of the three-judge court in declining jurisdiction of appellants' suit was correct.

II

THIS COURT SHOULD NOT SET ASIDE THE DETERMINATION OF THE INTERSTATE COMMERCE COMMISSION THAT THE SOUTH SHORE IS NOT AN INTERURBAN ELECTRIC RAILWAY

Although the case was heard in the District Court both on the jurisdictional question and on the merits, the court did not pass upon the latter. If this Court should hold that the District Court erred in deciding that it had no jurisdiction, we assume that the case will be remanded to that court for a decision on the merits. *Alton R. Co.* v. *United States*, 287 U. S. 229.

Appellants have argued the merits of the case at considerable length in their brief, however, and accordingly we desire to make a brief statement of our position on the merits, in the event that this

---

cute by the United States Attorney. In such cases carriers have insisted that the court must retry *de novo* the issue of whether the carrier comes within the statute, and have claimed that the court was not restricted merely to reviewing the decision of the Interstate Commerce Commission. This method of review is awkward and unsatisfactory, and if there were a choice, the appellees would much prefer to have the determinations of the Commission under Section 1 of the Railway Labor Act reviewed in the kind of proceeding here instituted.

Court should not remand the case for further proceedings. The appellees have no objection to a decision on the merits at this time.

A. THE DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION THAT THE SOUTH SHORE DOES NOT COME WITHIN THE EXEMPTION PROVISO FOR INTERURBAN RAILWAYS IS BINDING UPON THE COURTS UNLESS ARBITRARY, CAPRICIOUS, OR NOT BASED UPON SUBSTANTIAL EVIDENCE

The Railway Labor Act, as amended in 1934, differs from all prior federal regulatory statutes containing special exemptions for interurban electric railways. These earlier statutes[8] exempted such roads from the jurisdiction of the Commission; accordingly, it was necessary for the courts to determine for themselves the jurisdictional question as to whether particular carriers were interurban. It was under such statutes that *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, and *United States* v. *Chicago, North Shore & Milwaukee R. Co.,* 288 U. S. 1, arose and were decided.

This form of statutory exemption for interurban electric railways raised serious administrative difficulties when applied to those railroads which in some respects resembled interurban railways and in other respects ordinary commercial roads.

---

[8] Interstate Commerce Act §§ 1 (22), 15a (1) (now repealed), 20a (1); Locomotive Inspection Act, § 1, 43 Stat. 659, U. S. C., Title 45, § 22; Transportation Act of 1920, § 300, 41 Stat. 469; Railway Labor Act of 1926, § 1, 44 Stat. 577.

Neither the carriers nor the Commission could have any assurance in advance of final judicial determination whether any particular line of electric railway was subject to the Act.[4] The Commission repeatedly pointed out that the statutory language was unsatisfactory, and urged that it be made more specific.[5]

Experience under the Railway Labor Act of 1926 apparently demonstrated the advisability of establishing a mechanism by which it could be determined in advance of proceedings under the statute which of these electric railways were subject to the Act and which came within the exemption. When the 1934 Amendments were under consideration by Congress, the Board of Mediation recommended that the Interstate Commerce Commission, which was more experienced in such matters than the Board itself, be authorized to make such a determination.[*] Accordingly, the Act was amended so as to *authorize* and *direct* the Interstate Commerce Commission to decide which carriers were exempted by the proviso.. The advantage of having all such questions decided by a ~~single body "informed by experience" seems~~ obvious. *Cf. Illinois Central R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454; *United States* v. *Louisville & Nashville R. Co.,* 235 U. S. 314, 320; *Virginian Ry.* v. *United States,* 272 U. S. 658, 665.

---

[4] The confusion resulting from this uncertainty appears in both the *Piedmont* and *Chicago & North Shore* cases. In the former the carrier was required to begin construction of a new line of road before it could obtain a judicial determination that it did not come within the exemption and that the construction was illegal; in the latter, a decision that the carrier was subject to the Act might have invalidated millions of dollars of securities previously issued.

[5] See Annual Reports of the Interstate Commerce Commission, 35th, pp. 21, 58; 36th, pp. 30, 32, 76; 37th, p. 70; 38th, pp. 20, 78; 39th, pp. 20, 32, 72; 40th, pp. 20, 31; 41st, p. 6; 42nd, pp. 5, 79, 80, 83; 43rd, pp. 10, 89; 44th, pp. 22-23, 96; 45th, p. 122; 46th, pp. 20, 51, 73; 48th, pp. 15-16; 49th, pp. 20, 33-34, 97-98.

The Railway Labor Act thus differs from the earlier statutory provisions exempting street, suburban, and interurban electric railways in that it expressly authorizes the Interstate Commerce Commission to decide what carriers come within the exemption. Accordingly, the Commission's determination under the Act is not jurisdictional and the ordinary principles determining the scope of judicial review of administrative action apply. It is, of course, established beyond question by decisions of this Court too numerous to cite that apart from jurisdictional or constitutional matters, determinations of the Interstate Commerce Commission may be set aside only when arbitrary, capricious, or not based upon substantial evidence.[7]

---

[*] See Hearings before Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., S. 3266, pp. 22, 35, 158, 162; Hearings before House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., H. R. 7650, pp. 22, 84.

Appellants suggest that inasmuch as none of the facts as to the manner in which it carries on its business are in dispute, the determination as to whether those facts make it an interurban railway is one of law rather than one of fact, and therefore for the courts to decide. It is true that the determination as to whether petitioner is an interurban railway is one calling for the application of judgment to facts—but this does not make it a question of law. Most of the questions which the Interstate Commerce Commission is called upon to decide are of the same type. Properly regarded, the question of whether the South Shore is an interurban railway would seem to be one of ultimate fact or at most a mixed question of law and fact rather than one of law.[8]

The complete answer to appellants' argument was given by this Court in *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, in response to a similar contention that the courts need not accept the decision of the Interstate Commerce

---

[7] e. g., *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541; *Virginia Ry.* v. *United States*, 272 U. S. 658; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297.

[8] The difficulty of deciding borderline cases does not render the question any the less one of fact. *Cf. Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479 (the meaning of "sausage").

Commission as to the meaning of "undue preference" where the facts were undisputed.

The Court there declared (235 U. S. at 320), in language equally applicable here:

> * * * the court below, in substituting its judgment as to the existence of preference for that of the Commission *on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted* an authority not conferred upon it by the statute. * * * It cannot be otherwise since, if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action. [Italics supplied.]

B. THE DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION THAT THE SOUTH SHORE WAS NOT AN INTERURBAN IS NOT ARBITRARY OR CAPRICIOUS, OR WITHOUT SUBSTANTIAL EVIDENCE TO SUPPORT IT

Inasmuch as the opinion rendered by the Interstate Commerce Commission speaks for itself, it does not seem necessary to argue at length that it is neither arbitrary nor capricious, and that it is based upon substantial evidence. The fairness and reasonableness of the opinion, the painstaking care with which the Commission analyzed and gave consideration to all of the evidence before it, and the factual bases of the decision are all manifest upon its face. Even if the scope of judicial review were not so strictly limited, we submit that the decision of the Commission should be upheld. The decision is not only not unreasonable; the holding that a carrier which earns more than 51 per cent of its total transportation revenue from freight traffic is not an interurban railway would seem obviously correct.

The basic facts upon which the Commission relied in holding that the South Shore was not an interurban have already been set forth. See pages 6–7, *supra.* The South Shore has since 1931 derived over 50% of its revenue from freight traffic (R. 18, 51). The freight is carried in standard freight cars and is generally hauled in trains of 40 to 55 cars (R. 18). Ninety per cent of the freight carried is interchanged with the trunk line railroads, the road having connections with 7 trunk and 6 belt or switching lines. The road is an intermediate carrier on a large amount of through traffic and is a party to a large number of joint tariffs with the trunk lines (*ibid*). It competes with the lines of the New York Central system (R. 16). The road bed compares favorably with that of some of the steam roads in the vicinity, though it is not equal to that of the large trunk lines (R. 17). Although most of its passenger trains consist of one or two cars, the maximum number of coaches per train is ordinarily five or six (*ibid*).

Appellants do not challenge the findings of fact of the Commission. The substance of their argument is that if the Court disagrees with the judgment of the Commission as applied to those facts, that judgment should be set aside. But as the Court has repeatedly declared, "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." (*Virginian Ry.* v. *United States*, 272 U. S. 658, 665.) "Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment" (*Swayne & Hoyt, Ltd.*, v. *United States*, 300 U. S. 297, 303).

Appellants contend that the *Piedmont* and *Chicago North Shore* cases, the only cases in which this Court has determined the application of the exemptions for interurban electric railways, demonstrate that the Commission's decision was wrong. Analysis of those cases points to exactly the opposite conclusion. In those cases this Court pointed out that "it is not always easy to draw the line," that "instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception." See 286 U. S. at 312; 288 U. S. at 10. The *Piedmont & Northern*, 94.5 per cent of whose revenue came from freight traffic, was "not such a case," 286 U. S. at 312. It *clearly* was not an interurban. The *Chicago North Shore* case dealt with the application of

Section 20a of the Interstate Commerce Act to a carrier 76 per cent of whose revenue was derived from passenger traffic and only 22 per cent from freight. This carrier was regarded by the Court as presenting a borderline case. The Court conceded "that the proper classification of the railway is not free from difficulty." See 288 U. S. at 13, 11. Doubt was removed in that case by prior administrative construction of Section 20a as applied to the particular carrier involved 288 U. S. at 13.

The South Shore, with over 50 per cent of its revenue derived from freight traffic, falls between the Piedmont & Northern—the easy case—and the Chicago North Shore—the borderline case. It is not so clearly a standard freight railway as the Piedmont, inasmuch as the latter carries a much larger proportion of freight traffic. On the other hand, the South Shore is clearly much less like an interurban than the Chicago North Shore, which was described by this Court as follows (288 U. S. at 10):

> The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. *The freight business is subsidiary to this primary function,* and is not fairly comparable to that ordinarily transacted by a standard steam railroad. *Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline freight business.* The main termi-

> nals serve only the passenger and merchandise freight traffic.
>
> We have thus a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. [Italics supplied.]

Inasmuch as less than half of its revenues are derived from passenger traffic, the South Shore cannot be regarded as predominately a passenger line, with its freight business "subsidiary to this primary function"—the carriage of passengers.

With the *Piedmont* presenting an easy case and the *Chicago North Shore* a close one, and the petitioner falling between and not possessing the chief characteristics which made the North Shore an interurban, it would seem under this Court's decisions that petitioner was properly classified as not being an interurban railway. Thus, even if the question were to be decided *de novo* by the courts, without giving any weight to the Interstate Commerce Commission decision, it would appear that the Commission correctly applied the principles laid down by this Court.

But as has been pointed out, in this case it is not necessary to go that far. The scope of judicial review is different under the Railway Labor Act from that under the sections of the Interstate Commerce Act involved in the *Piedmont* and *North*

Shore cases, which did not authorize the Interstate Commerce Commission to make the determination. The only question here is whether the Commission's decision was arbitrary, capricious, or unsupported by the evidence. Regardless of whether or not a court would reach the same conclusion, there can be no doubt at all that the Commission's finding satisfies this test.

It is significant in this connection that the Commission's determination follows a prior Commission decision made before the amendments to the Railway Labor Act in 1934, holding the South Shore not to be an interurban railway. See *Rules for Testing Other than Steam Power Locomotives*, 122 I. C. C. 414. Both of the Commission's decisions relating to the South Shore are in accord with a number of other Commission rulings that interurban railways are lines primarily devoted to the transportation of passengers, and that roads not falling within this description are not interurban.[9] It must be assumed that Congress was aware of these decisions when, in the Railway Labor

---

[9] See *In the Matter of the Application of the Western Pacific Railroad Company for Authority to Acquire Control of the Sacramento Northern Railway and to Purchase the Bonds of the Sacramento Northern Railroad*, 71 I. C. C. 653; *Proposed Control of Sacramento Northern by W. P. R. R.*, 79 I. C. C. 782; *Application of Section 15A of the Interstate Commerce Act to Electric Railways*, 86 I. C. C. 751, 753; *Proposed Construction of Lines by Piedmont & Northern Ry. Co.*, 138 I. C. C. 363, 368, 372; *Railway Mail Pay: In the Matter of the Application of the Illinois Terminal Company*, 174 I. C. C. 796, 799.

Act amendments, it selected the Commission to determine which electric lines were interurban, and that in the absence of other directions, Congress intended the Commission to follow the standards previously adopted.

Appellants argue at length that under Indiana statutes and decisions the South Shore is treated as an interurban railway. But as this Court declared in *United States* v. *Brooklyn Terminal,* 249 U. S. 296, 304, a carrier's status under federal statutes "does not depend upon whether a charter declares it to be a common carrier, nor upon whether the State of incorporation considers it such; but upon what it does."

CONCLUSION

It is respectfully submitted that the judgment of the district court should be affirmed.

✓ **GOLDEN W. BELL,**
✓ *Acting Solicitor General.*
ROBERT H. JACKSON,
Assistant Attorney General.
✓**LEO F. TIERNEY,**
✓ **WENDELL BERGE,**
✓ **ROBERT L. STERN,**
Special Assistants to the Attorney General.
✓**NELSON THOMAS,**
Attorney, Interstate Commerce Commission.
✓ **DANIEL W. KNOWLTON,**
Chief Counsel,
Interstate Commerce Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1938

SUPREME COURT OF THE UNITED STATES.

No. 502.—October Term, 1937.

John N. Shannahan, et al., Trustees, Appellants, *vs.* United States of America, et al.	Appeal from the District Court of the United States for the Northern District of Indiana.

[April 4, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

The sole question for decision is whether the District Court had jurisdiction of this controversy under the Urgent Deficiencies Act of October 22, 1913.[1]

The Chicago South Shore and South Bend Railroad is an interstate electric railway subject to the Interstate Commerce Act. On August 9, 1934, the National Mediation Board requested the Commission to determine whether that carrier fell within the exemption from the scope of the Railway Labor Act, as amended June 21, 1934, 48 Stat. 1185, c. 691 (45 U. S. C. § 151). That Act confers upon the National Mediation Board certain duties in respect to carriers by railroad subject to the Interstate Commerce Act, with the following exception:

"*Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

After due hearing had, at which the South Shore introduced evidence and filed its brief, the matter was argued orally before the Commission, which, on February 14, 1936, made its Report and the following determination (214 I. C. C. 167, 173):

---

[1] c. 32, 38 Stat. 208, 219, 220, 28 U. S. C. §§ 41(28), 46, 47.

> "We find that the line of the Chicago, South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act."

No order was entered thereon by the Commission.

Shannahan and Jackson, who had been appointed Trustees of the South Shore by the federal court for northern Indiana, and had filed their appearance in the proceeding, applied for a rehearing. An order was entered denying the same. Thereupon, the Trustees filed this suit against the United States, invoking the jurisdiction of the court under the Urgent Deficiencies Act of October 22, 1913, to set aside the alleged order. They do not deny that the South Shore is an interstate carrier subject to the jurisdiction of the Commission; and that the Act is constitutional. Their contention is that:

> "A correct application of the law to the undisputed facts leads to the conclusion that the lines of the railroad of appellants are an electric interurban railway under the exemption proviso of the first division of Section 1 of the Railway Labor Act and that there is no substantial evidence to support the conclusion and determination of the Commission."

The Commission intervened. Its answer, and that of the United States, challenged the jurisdiction of the court on the ground that the determination of the Commission was not an "order" within the meaning of the Urgent Deficiencies Act. The case was heard before three judges on the pleadings and evidence; and a decree was entered dismissing the bill for want of jurisdiction, one judge dissenting. 20 F. Supp. 1002. The Trustees appealed.

First. The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It "had no characteristic of an order, affirmative or negative". *United States* v. *Illinois Cent. Ry.*, 244 U. S. 82, 89; *United States* v. *Atlanta, B. & C. Ry.*, 282 U. S. 522, 527-28. Compare *Lehigh Valley R. R.* v. *United States*, 243 U. S. 412, 414. But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. "It was merely preparation for possible action in some proceeding which may be instituted in the future". *United States* v. *Los Angeles & S. L. R. R.*, 273 U. S. 299, 310. The determination is thus not enforceable by the Commission; the only action which could ever be taken on it would be by some other body. It is as clearly "negative" as orders by which the Commission refuses to take requested action. *United States* v. *Griffin*, 302 U. S. —.[2] As such, it is not reviewable under the Urgent Deficiencies Act.

Second. Moreover, the determination of the Commission is not even a decision which the Mediation Board, by whom it was sought, is empowered to enforce. The Act confers upon the Board no power over any carrier. It merely imposes upon the Board possible duties in respect to interstate carriers by railroad not exempted by the proviso. The Board's duties, in case of dispute between carrier and employees, require it:

(1) to "promptly put itself in communication with the parties to [the] controversy, and . . . use its best efforts, by mediation, to bring them to agreement". When a dispute is settled through these efforts a mediation agreement is signed, and should any question arise subsequently regarding the meaning or application of such an agreement, the Board is required upon request of either party "and after a hearing of both sides [to] give its interpretation within thirty days."

(2) If the mediating efforts prove unsuccessful, it is the Board's duty to "at once endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration, in accordance with the provisions of" the Act. If arbitration is agreed upon it may become the Board's duty to name a third arbitrator if the two named by the parties fail to select him.

(3) If arbitration is refused and the dispute threatens "substantially to interrupt commerce to a degree such as to deprive any section of the country of essential transportation service", then the Board is required to notify the President.

(4) If, in selecting representatives to deal with the carriers, disputes arise among employees as to what organization they desire to represent them, it is the duty of the Board, on request of either party, to investigate and to certify in writing to the parties and to the carrier the names of the individuals or organizations that have been designated and authorized to represent the employees.

---

[2] See also Procter & Gamble Co. *v.* United States, 225 U. S. 282; Hooker *v.* Knapp, 225 U. S. 302; Lehigh Valley R. R. *v.* United States, 243 U. S. 412, 414; Manufacturers Ry. *v.* United States, 246 U. S. 457, 482-83; Atchison, T. & S. F. Ry. *v.* United States, 279 U. S. 768, 781; Piedmont & No. Ry. *v.* United States, 280 U. S. 469, 475-77; Standard Oil Co. *v.* United States, 283 U. S. 235, 238; United States *v.* Corrick, 298 U. S. 435, 438.

(5) If the National Railroad Adjustment Board undertakes arbitration, and it fails to select a referee, the Mediation Board has the duty of doing so.

In order not to fail in the performance of these duties the Mediation Board had to satisfy itself whether the South Shore was a railroad within the exemption proviso. To that end, it applied to the Commission for its determination. If it had omitted to do so, the application might have been made "upon complaint of any party interested." The determination, whether applied for by the Board, by a carrier, or by employees, is clearly not an order enforceable within the meaning of the cases construing and applying the Urgent Deficiencies Act. It is a decision on a controverted matter, comparable to that considered in *United States* v. *Los Angeles & Salt Lake R. R. Co*, 273 U. S. 299, in *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, in *United States* v. *Atlanta B. & C. Ry.*, 282 U. S. 522, and in *United States* v. *Griffin*, 302 U. S. —, which were held not to be subject to review under the Urgent Deficiencies Act.

Third. The Trustees argue that the determination of the Commission is an affirmative "order, because it fixed for the first time, by the only body authorized by law to do so, the status of the carrier"; that by fixing the status, the obligations of the Railway Labor Act are fixed upon the carrier; and that wilful failure or refusal of any carrier to comply with certain of the obligations is made a misdemeanor.[3]

Lehigh Valley R. R. Co. v. *United States*, *supra*, shows that the determination of a status or similar matter is not action subject to review under the Urgent Deficiencies Act even if disregard of the determination may subject the carrier to criminal prosecution.[4] The Panama Canal Act prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water where the railroad might compete with the water carrier; prescribed a heavy penalty for any violation of the prohibition; and conferred upon the Commission jurisdiction:

---

[3] 45 U. S. C. § 152(10). That declares: "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh or eighth paragraph of this section shall be a misdemeanor. . . ." The third paragraph prohibits interference, influence or coercion in the designation of representatives. The fourth assures the right of employees to bargain collectively through representatives of their own choosing, and forbids carriers to maintain or financially assist any labor organization. The fifth prohibits carriers from requiring any person seeking employment to sign any contract to join or not to join a labor union. The seventh prohibits carriers from changing rates of pay, rules or working conditions of employees as a class except as prescribed in Section 156. The eighth requires carriers to notify its employees by printed notices in such form as shall be specified by the Mediation Board that all disputes will be handled in accordance with the requirements of the Act.

[4] For details, see opinion of the District Court for Eastern Pennsylvania, 234 Fed. 682.

> "to determine the questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation . . . of this section and pray for an order permitting the continuance of any vessel or vessels already in operation. . . ."

Thereupon in January, 1914, the Lehigh Valley filed with the Commission a petition for a hearing on the question whether the services of a steamboat line owned by it would be in violation of the above section and for an extension of time. The Commission held that, by virtue of the arrangements found to exist, the railroad did or might compete with its boat line; and dismissed the petition. This Court held that the risk to which the railroad was left subject did not come from the order, but from the statute which contained the prohibition and provided a penalty; that, therefore, it was not an affirmative order; and that the District Court was without jurisdiction under the Urgent Deficiencies Act. Compare also *Piedmont & No. Ry.* v. *United States,* 280 U. S. 469, 476-77.

Fourth. Whether the determination of the Commission is reviewable in a district court by some judicial procedure other than that of the Urgent Deficiencies Act we have no occasion to consider. Compare *United States* v. *Griffin, supra,* and *Lehigh Valley Ry. Co.* v. *United States, supra.*[5]

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

---

[5] In Utah-Idaho Cent. Ry. *v.* Shields (unreported), D. Utah, Oct. 15, 1936, and in Hudson & Manhattan Ry. *v.* Hardy (unreported), S. D. N. Y., Feb. 21, 1938 (where jurisdiction under the Urgent Deficiencies Act was specifically denied), the electric railways involved were declared in proceedings before single judges to be within the proviso excluding them from the application of the Act, and final injunctions against prosecution for penalties were granted, although the Interstate Commerce Commission, in 214 I. C. C. 707 and 216 I. C. C. 745, respectively, had reached the opposite conclusion. In Texas Electric Ry. *v.* Eastus (unreported), N. D. Tex., June 4, 1936, a preliminary injunction was likewise granted in spite of the Commission's decision in 208 I. C. C. 193. From informal sources it has been learned that similar proceedings have been instituted in other cases. Chicago Warehouse & Term. Co. *v.* Igoe, N. D. Ill., and Chicago Tunnel Co. *v.* Igoe, N. D. Ill., to review 214 I. C. C. 81; Hudson & Manhattan Ry. *v.* Quinn, D. N. J., to review 216 I. C. C. 745; New York, W. & B. R. R. *v.* Hardy, S. D. N. Y., to review 218 I. C. C. 253.